Supreme Court, U.S.
FILED
MAY 14 2001
OFFICE OF

No. 00-1699

IN THE

Supreme Court of the United States

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 14, 2001

QUESTIONS PRESENTED

1. Whether a state public utility commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a "determination under [section 252]" and thus is reviewable in federal court under 47 U.S.C. § 252.

2. Whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

3. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

4. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

BellSouth Telecommunications, Inc.

Federal Communications Commission

MCImetro Access Transmission Services, Inc.

North Carolina Utilities Commission

United States of America

US LEC of North Carolina LLC (now US LEC of North Carolina Inc.)

Intermedia Communications was a defendant in the district court but did not participate in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner BellSouth Telecommunications, Inc. states the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held company. BellSouth Corporation has no parent company, and no publicly owned company owns more than 10% of its stock.

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IN THE

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No.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 240 F.3d 270. The orders of the district court (Pet. App. 85a-91a, 99a-105a, 115a-118a) are not reported. The orders of the North Carolina Utilities Commission (Pet. App. 17a-84a, 92a-98a, 106a-114a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 119a-140a.

STATEMENT OF THE CASE

In this case, the Fourth Circuit held that: (i) a state public utility commission does not waive its Eleventh Amendment immunity by electing to exercise federal authority to implement the Telecommunications Act of 1996 ("1996 Act") pursuant to 47 U.S.C. § 252; (ii) a state public utility commission's actions interpreting or enforcing an interconnection agreement under the 1996 Act is not a "determination" under 47 U.S.C. § 252 and therefore is not reviewable in federal court under § 252(e)(6); and (iii) where 47 U.S.C. § 252(e)(6) does not itself provide subject matter jurisdiction, a federal district court lacks independent subject matter jurisdiction under 28 U.S.C. § 1331 to review a state commission's actions that are alleged to violate the 1996 Act.

The first and second of those holdings — on waiver and the scope of § 252(e)(6) — raise questions substantially identical to those on which this Court granted certiorari in *Mathias v. WorldCom Technologies., Inc.*, No. 00-878 (Mar. 5, 2001). BellSouth also raised in this case, and the Fourth Circuit decided in a companion case decided on the same day (*Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279 (4th Cir. 2001), *petition for cert. pending*, No. 00-1531 (filed Apr. 5, 2001)), the question whether the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), authorizes suit against

individual commissioners in this context.[1] That question is also presented in *Mathias*. For all those reasons, this petition should be held pending resolution of that case.

The Fourth Circuit's final holding here — whether jurisdiction exists in this case under 28 U.S.C § 1331 — raises the same question that Verizon Maryland has already sought to bring before this Court in its petition for certiorari from the Fourth Circuit's companion *Bell Atlantic Maryland* decision. *See Verizon Maryland Inc. v. Public Serv. Comm'n of Maryland*, No. 00-1531 (filed Apr. 5, 2001). Accordingly, this petition should be held pending the Court's disposition of that petition as well.

1. The Role of State Commissions Under the 1996 Act

As this Court has previously held, and as briefing in *Verizon Maryland* and *Mathias* explains in greater detail, the 1996 Act effected a sea change in the regulation of telecommunications. In particular, the 1996 Act for the first time establishes *federal* rules that are designed to enhance competition in local, intrastate telecommunications markets. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999) ("With regard to the matters addressed by the 1996 Act, [the federal government] unquestionably has" "taken the regulation of local telecommunications competition away from the

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[1] BellSouth's complaint in this case did not name the individual state commissioners as defendants. If, however, this Court were to hold in *Mathias* that *Ex parte Young* provides the sole mechanism to proceed against the state defendants, BellSouth should have an opportunity to amend its complaint to name those defendants. *See infra* page 9 (citing cases). BellSouth argued precisely that point in the Fourth Circuit, but that court did not reach the issue (presumably because of its holding in *Bell Atlantic Maryland* that an *Ex parte Young* suit is not available in this context). If *Mathias* establishes a contrary proposition, BellSouth would have a chance to present this issue again on remand to the Fourth Circuit.

States."). Although Congress could have reserved to the federal government the authority to implement all of these new statutory requirements, it opted instead to allow state public utility commissions to exercise a portion of that federal authority.

In particular, in cases where "incumbent local exchange carriers" — companies like BellSouth that provided local service in specific geographic areas at the time of the 1996 Act's passage — cannot agree with new entrants on the terms of an "interconnection agreement" governing the terms of access to the incumbent's network, Congress granted state commissions the authority to arbitrate the private parties' dispute. *See* 47 U.S.C. § 252(b). In those circumstances, state commissions are authorized to "impos[e] conditions" that ensure conformity with federal law. *Id.* § 252(c). Additionally, all interconnection agreements, whether adopted by negotiation or arbitration, must "be submitted for approval to the State commission." *Id.* § 252(e)(1). Finally, both the Federal Communications Commission ("FCC") and multiple circuit courts have held that, once an agreement is approved, the 1996 Act gives the state commission continuing "responsibility" under § 252 to "interpret and enforce" the agreement. Memorandum Opinion and Order, *Starpower Communications, LLC*, 15 FCC Rcd 11277, 11279-80, ¶ 6 (2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000).

The 1996 Act, however, does not *require* states to participate in this process, and states suffer no penalty

for choosing not to take part. Rather, the sole consequence of such a decision is that the FCC "shall issue an order preempting the State commission's jurisdiction . . . and shall assume the responsibility of the State commission." 47 U.S.C. § 252(e)(5); *see also id.* § 252(e)(6) (FCC proceeding and judicial review of that proceeding "shall be the exclusive remedies for a State commission's failure to act").

If a state does choose to participate in the federal scheme, the 1996 Act explicitly provides that its determinations under § 252 are subject to review in federal district court. Section 252(e)(6), entitled "Review of State commission actions," states: "*In any case in which a State commission makes a determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [§§ 251 and 252]." *Id.* § 252(e)(6) (emphasis added).

2. The Dispute in this Case

The underlying question in this case, as in both *Mathias* and *Verizon Maryland*, is whether a form of payment known as "reciprocal compensation" applies to Internet-bound calls. Moreover, in this case, as in those other matters, the incumbent local exchange carrier (here, BellSouth) negotiated interconnection agreements that track federal statutory and regulatory law in establishing the kinds of calls for which reciprocal compensation applies. *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701 (2000). The FCC has repeatedly held that neither § 251(b)(5) nor its implementing regulations are properly understood to

require reciprocal compensation for Internet-bound traffic.[2]

In sharp contrast to those FCC holdings, the North Carolina Utilities Commission ("NCUC"), purporting to interpret interconnection agreements between BellSouth and several carriers, held that BellSouth was obliged to pay "reciprocal compensation" for Internet-bound calls originating on BellSouth's network and routed through an Internet service provider ("ISP") served by three BellSouth competitors.[3]

3. Proceedings Below

a. District Court. BellSouth sought review of those NCUC decisions by filing three separate actions in the United States District Court for the Western District of North Carolina. The complaints named as defendants the NCUC and the private carriers to whom BellSouth allegedly owed reciprocal compensation.

The NCUC moved to dismiss the complaints on the ground that the Eleventh Amendment precluded any action against the NCUC, and that the district court lacked subject matter jurisdiction over the dispute. Before the court could rule on defendant's motions, however, the FCC issued a decision in which it held Internet-bound traffic to be "non-local interstate

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[2] Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, 2001 FCC LEXIS 2340, ¶ 35 (rel. Apr. 27, 2001) ("*ISP Order on Remand*"); Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3699, 3702, 3706, ¶¶ 13, 18, 26 n.87 (1999) ("*ISP Declaratory Ruling*"), *vacated and remanded for further consideration, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

[3] *See* Pet. App. 19a-20a, 70a-72a (MCImetro Access Transmission Services, Inc.), 96a-98a (Intermedia Communications), 111a-114a (US LEC of North Carolina LLC).

traffic."[4] In light of that FCC ruling, the district court, after first deciding that it had subject matter jurisdiction over the dispute pursuant to § 252(e)(6), declined to reach the merits of BellSouth's claims. Rather, the court remanded the cases to give the NCUC the opportunity to reexamine its decisions in light of the FCC's opinion. *See* Pet. App. 90a, 104a-105a, 116a. The district court found "it unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC." *Id.* at 90a, 104a-105a; *id.* at 117a.

b. Court of Appeals. A divided panel of the Fourth Circuit determined that the Eleventh Amendment barred this suit against the state commission and that the district court lacked statutory jurisdiction under either § 252(e)(6) or § 1331 to hear this claim against the private defendants. *Id.* at 8a-14a.

The majority began by reiterating its conclusion in *Bell Atlantic Maryland* that a state does not waive its Eleventh Amendment immunity by participating "in regulation under the 1996 Act." *Id.* at 9a. "As we more fully developed in *Bell Atlantic v. MCI WorldCom*, the courts will not find an implied or constructive waiver of Eleventh Amendment immunity." *Id.*[5] BellSouth had also argued in the Fourth Circuit that *Ex parte Young*

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[4] *ISP Declaratory Ruling*, 14 FCC Rcd at 3706, ¶ 26 n.87. In its *ISP Order on Remand*, the FCC reiterated its conclusion that Internet-bound traffic is interstate in nature. In addition, the FCC concluded that Congress had exempted Internet-bound communications from the definition of telecommunications traffic for which § 251(b)(5) requires reciprocal compensation arrangements.

[5] The court of appeals rejected the district court's assertion that it could defer consideration of the Eleventh Amendment question until the case returned from the NCUC. Because the "very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process" (Pet. App. 11a (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993))) of litigation in the federal courts, the court's refusal to address the issue "interfered with North Carolina's sovereignty" (*id.* at 10a).

provides an independent basis for jurisdiction here, and that BellSouth was entitled to amend its complaint to take advantage of *Ex parte Young*. *See supra* note 1. The Fourth Circuit rejected those same *Ex parte Young* arguments as a basis for jurisdiction in its companion *Bell Atlantic Maryland* decision (240 F.3d at 294-98), but it did not reiterate that holding in this case.

The majority then held that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. In its view, "'State commission determinations under § 252 involve only approval or rejection of . . . interconnection agreements.'" Pet. App. 12a (quoting *Bell Atlantic Maryland*, 240 F.3d at 302-03). By contrast, "[t]he present disputes involve contract administration and turn on the proper interpretation of these agreements and their proper enforcement." *Id.* Relying again on its decision in *Bell Atlantic Maryland*, the court explained that such decisions were "'not reviewable in federal court by virtue of § 252(e)(6).'" *Id.* at 13a (quoting *Bell Atlantic Maryland*, 240 F.3d at 305).

Finally, the court held that "the general jurisdictional statutes do not" provide jurisdiction over BellSouth's claims. *Id.* at 14a. In its judgment, "the carefully considered intent of Congress was to provide limited review of State commission decisions in federal court and to leave all other review of State commission decisions to the State courts." *Id.* at 13a.

Judge King dissented "[f]or the reasons more fully articulated in my opinion in the companion [*Bell Atlantic Maryland*] case." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The Court Should Hold this Case Pending Resolution of *Mathias* and *Verizon Maryland*.

This case presents the same questions on which this Court granted certiorari in *Mathias*. Specifically, the Fourth Circuit decided the same issues regarding waiver of Eleventh Amendment immunity under the 1996 Act and § 252(e)(6) jurisdiction to review interpretation or enforcement determinations that the Court has agreed to decide in *Mathias*. Because the decision in *Mathias* may cast new light on these issues, the Court should hold this petition for certiorari pending resolution of that case.

Additionally, BellSouth sought to present the same *Ex parte Young* issue in this case that this Court agreed to review in *Mathias*, and the Fourth Circuit decided that issue in its companion *Bell Atlantic Maryland* opinion. If this Court determines in *Mathias* that *Ex parte Young* does apply here, BellSouth should be entitled to raise the *Ex parte Young* issue on remand before the Fourth Circuit, and to argue again that it may amend its complaint either in the court of appeals or in the district court to take advantage of that doctrine. *See Foman v. Davis*, 371 U.S. 178 (1962) (when underlying facts and circumstances can be subject of relief, plaintiff should be afforded opportunity to amend complaint to test claim on the merits); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 (1989) ("'[T]here is . . . in the nature of . . . appellate jurisdiction, nothing which forbids the granting of amendments.'" (quoting *Anonymous*, 1 F. Cas. 996, 997 (C.C. Mass. 1812) (No. 444) (Story, Circuit Justice))); *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997) (permitting amendment on appeal to name individual state officials so suit can proceed under *Ex parte Young*); Fed. R. Civ. P. 15(a)

(permitting amendment as of right where, as here, defendants have yet to serve a responsive pleading).

Finally, this case also presents the independently important § 1331 issue addressed in the petition for certiorari filed by Verizon Maryland in No. 00-1531. This petition, accordingly, should also be held pending the Court's disposition of that petition as well.

CONCLUSION

The petition should be held pending the Court's disposition of *Mathias* and *Verizon Maryland* and then disposed of as appropriate in light of those decisions.

Respectfully submitted,

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May 14, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-1845

BELLSOUTH TELECOMMUNICATIONS, INCORPORATED,
Plaintiff-Appellee,

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Intervenors,

v.

NORTH CAROLINA UTILITIES COMMISSION,
Defendant-Appellant,

and

US LEC OF NORTH CAROLINA, LLC,
Defendant.

No. 99-1846

BELLSOUTH TELECOMMUNICATIONS, INCORPORATED,
Plaintiff-Appellee,

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Intervenors,

v.

NORTH CAROLINA UTILITIES COMMISSION,
Defendant-Appellant,

and

INTERMEDIA COMMUNICATIONS,
Defendant.

No. 99-1847

BELLSOUTH COMMUNICATIONS, INCORPORATED,
Plaintiff-Appellee,

v.

NORTH CAROLINA UTILITIES COMMISSION,
Defendant-Appellant,

and

MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED,
Defendant-Appellee,

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Intervenors.

No. 99-1970

BELLSOUTH COMMUNICATIONS, INCORPORATED,
Plaintiff-Appellee,

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Intervenors,

v.

US LEC OF NORTH CAROLINA, LLC,
Defendant-Appellant,

and

NORTH CAROLINA UTILITIES COMMISSION,
Defendant.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte
Graham C. Mullen, Chief District Judge
(CA-98-170-3-MU, CA-99-5-3-MU, CA-99-97-3-MU)

Argued May 1, 2000
Decided Feb. 14, 2001

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

Vacated and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WIDENER joined. Judge KING wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

BellSouth Telecommunications, Inc., the incumbent local telephone company in North Carolina, filed these three actions, seeking to review decisions of the North Carolina Utilities Commission (the "NCUC") that required BellSouth to pay competing carriers reciprocal compensation for telephone calls made by BellSouth's customers to internet service providers served by the competing carriers. Bell South relied on the Telecommunications Act of 1996 as authority to name the NCUC as a defendant in these federal court actions and for subject matter jurisdiction. BellSouth also relied on 28 U.S.C. §§ 1331 and 1332 for subject matter jurisdiction.

The district court determined that it had jurisdiction under the Telecommunications Act to hear the cases, but, in light of an intervening ruling by the Federal Communications Commission ("FCC"), it remanded the cases to the NCUC "to give [it] an opportunity to reexamine its conclusions with the benefit of the recent FCC ruling." The district court found it unnecessary "at this time" to reach NCUC's assertion of immunity from suit in federal court under the Eleventh Amendment.

The NCUC appeals, asserting that the district court erred both in its refusal to respect NCUC's sovereign immunity and in its exercise of federal jurisdiction over these disputes, which the NCUC contends may be resolved only in North Carolina state courts. A competing carrier named as a defendant in one of the actions, U.S. LEC of North Carolina, L.L.C., also appeals, asserting that the district court did not have subject matter jurisdiction. For the reasons that follow and those given in our contemporaneous decision in *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 2001 WL 123663 (4th Cir. Feb. 14, 2001), we vacate the district court's orders in these cases and remand with instructions to dismiss these actions.

I

Congress enacted the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614) (sometimes, the "1996 Act") with the purposes of reducing regulation in the telecommunications industry and promoting competition. As part of that effort, the 1996 Act enables local exchange carriers ("LECs") to use each other's networks by requiring LECs to enter into interconnection agreements through either voluntary negotiation or binding arbitration. *See* 47 U.S.C. § 252(a)(b). In particular, the 1996 Act requires, among other things, that each LEC, through such an interconnection agreement, "afford access" to its facilities and local network exchange, "provide interconnection" to that network to "any requesting telecommunications carrier," and "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(4), (b)(5), (c)(2). Through such reciprocal compensation arrangements, LECs pay each other for inter-carrier calls. Thus, if a subscriber of carrier A calls a subscriber of carrier B, carrier A must share with carrier B some of the revenues collected from the calling-subscriber to compensate carrier B for use of its facilities. Under regulatory authority conferred by the

1996 Act, the FCC has construed the scope of the reciprocal compensation obligation to apply to the "transport and termination of *local* telecommunications traffic." 47 C.F.R. § 51.701(a) (emphasis added). The interconnection agreements, whether reached through voluntary negotiation or through arbitration, are subject to review by State public service commissions and thereafter, in certain circumstances specified by the 1996 Act, by federal courts, and in other circumstances, by State courts.

BellSouth, the incumbent LEC in North Carolina, entered into interconnection agreements with competing LECs, U.S. LEC of North Carolina, L.L.C. ("US LEC"), Intermedia Communications, Inc. ("Intermedia"), and MCImetro Access Transmission Services, Inc. ("MCImetro"). BellSouth negotiated its agreements with U.S. LEC and Intermedia, and although portions of its agreement with MCImetro were arbitrated as provided by the 1996 Act, the reciprocal compensation provisions in that agreement were also negotiated. The NCUC approved these agreements on January 29, 1997; October 10, 1996; and May 12, 1997, respectively, and no judicial review of these approvals was sought.

Shortly after these interconnection agreements were approved, the parties found themselves in disputes over whether BellSouth was required to pay reciprocal compensation for its subscribers' telephone calls made to Internet Service Providers ("ISPs") that had local telephone numbers but provided access to interstate destinations through the Internet. BellSouth maintained that ISP-bound telephone calls were not local traffic and therefore did not trigger reciprocal compensation obligations under the parties' interconnection agreements. The competing LECs, on the other hand, took the position that ISP-bound calls were local traffic because the calls to the ISP numbers were local. The parties agree that this issue involves substantial sums of money.

To resolve the dispute, the LECs filed separate petitions against BellSouth before the NCUC, alleging that BellSouth was in breach of its interconnection agreements with them and requesting declaratory judgments that ISP-bound telephone calls are local traffic and injunctive relief directing BellSouth to pay reciprocal compensation due in respect to those calls. In each case, the NCUC ruled in favor of the competing LEC, declaring that "the reciprocal compensation provision contained in the [interconnection agreements] is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area." The NCUC also directed that BellSouth pay reciprocal compensation for such calls, including "all sums currently due together with the required late payment charges" as well as "all sums coming due in the future." *In re Interconnection Agreement Between BellSouth Telecomms., Inc., and U.S. LEC of North Carolina, LLC*, Docket No. P-55, SUB 1027 (N.C.U.C. Feb. 26, 1998); *see also In re Enforcement of Interconnection Agreement Between Intermedia Communications, Inc., and BellSouth Telecomms., Inc.*, Docket No. P-55, SUB 1096 (N.C.U.C. Nov. 4, 1998); *In re Complaint of MCImetro Access Transmission Servs., Inc. against Bell South Telecomms., Inc., for Breach of Approved Interconnection Agreement*, Docket No. P-55, SUB 1094 (N.C.U.C. Feb. 10, 1999).

Seeking to review the decisions of the NCUC, BellSouth filed separate actions in the district court against each of the competing LECs, naming as defendants in each action the applicable LEC and the NCUC. BellSouth alleged that under federal law, telephone calls made to the ISPs are interstate in nature, and it sought declaratory judgments and injunctive relief prohibiting enforcement of the NCUC's orders. The NCUC filed a motion to dismiss in each action, asserting that the action was barred by the Eleventh Amendment and that the 1996 Act does not confer subject matter jurisdiction

on federal district courts to review State commission determinations enforcing or interpreting interconnection agreements. US LEC also filed a motion to dismiss the action against it on the ground that the district court lacked subject matter jurisdiction. The United States was permitted to intervene to oppose the NCUC's motion to dismiss the suits.

While the motions to dismiss were pending before the district court, the FCC issued a ruling (since vacated by the United States Court of Appeals for the D.C. Circuit) that declared ISP-bound traffic to be "non-local." *See In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3690 (¶ 1) (1999) ("FCC Ruling"), *vacated*, *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C.Cir.2000). The FCC noted, however, that the parties to interconnection agreements "may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic." FCC Ruling, 14 FCC Rcd at 3703-04 (¶ 24). Indeed, the FCC also concluded that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions." *Id.* at 3703 (¶ 22). In light of the FCC Ruling, the district court requested additional briefing from the parties. In its supplemental brief, the NCUC maintained that its determinations in these cases were consistent with the FCC Ruling but also suggested that the district court "might decide that the case should be remanded to the NCUC for reconsideration in light of the FCC's opinion."

The district court issued orders in two of the cases on May 20, 1999, and in the other, on May 24, 1999, finding in each case that it had jurisdiction under the 1996 Act, pursuant to 47 U.S.C. § 252(e)(6), to review the NCUC's orders interpreting and enforcing inter-

connection agreements. The court then "turn[ed] to the merits of the case[s]" and concluded that in light of the intervening ruling of the FCC, it would remand the cases to the NCUC to give the commission the opportunity "to reexamine" its decisions in light of the FCC Ruling. The court dismissed without prejudice BellSouth's claims for declaratory judgment and injunctive relief and found "it unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC," therefore not ruling on the NCUC's immunity defense. From these orders, the NCUC and U.S. LEC filed appeals.

The NCUC contends that its sovereign immunity entitled it at the outset to a ruling on its Eleventh Amendment immunity defense and that in failing to rule on this defense, the district court "disregard[ed] the important sovereignty concerns underlying the Eleventh Amendment." The NCUC contends also, as does U.S. LEC, that the district court lacked subject matter jurisdiction. They maintain that the federal review jurisdiction supplied by 47 U.S.C. § 252(e)(6) "is limited to the review of decisions of State commissions *approving* agreements or statements," not *interpreting and enforcing* them once approved. US LEC also argues that the district court did not have subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1332.

By order dated July 9, 1999, we consolidated these cases for purposes of briefing and oral argument.

II

For its principal argument, the NCUC contends that the district court's exercise of Article III jurisdiction over it to remand this case to the NCUC in effect vacated the NCUC's decision and ordered it to reconsider its decision in light of the intervening FCC ruling. The NCUC maintains that "[t]he district court's action in doing so utterly disregards the important sovereignty concerns underlying the Eleventh Amendment." It relies on the Supreme Court's recent decision in *College*

Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999), which held that because Florida's sovereign immunity was not validly abrogated nor voluntarily waived, "the federal courts are without jurisdiction to entertain this suit against an arm of the State of Florida." *Id.* at 2233.

The appellees, as well as the United States as intervenor, contend that the NCUC, "by accepting Congress's offer to wield federal regulatory authority over the interconnection process," waived its immunity from suit in federal court. In *Bell Atlantic v. MCI Worldcom*, 2001 WL 123663 (4th Cir.2001), we rejected this argument, and for the reasons given there, we reject it in this case. The 1996 Act may fairly be construed to condition States' participation in regulation under the 1996 Act on their consent to *federal review* of State commission determinations made under 47 U.S.C. § 252. But the 1996 Act makes no reference to any authorization to sue the State itself in federal court and, more importantly, to suggest that the States waive their Eleventh Amendment immunity. As we more fully developed in *Bell Atlantic v. MCI Worldcom*, the courts will not find an implied or constructive waiver of Eleventh Amendment immunity; Congress's intent to condition participation in a federal program on waiver of such immunity must be explicit and unmistakably clear. *See Bell Atlantic v. MCI Worldcom*, 2001 WL 123663.

The appellees argue that we need not reach the Eleventh Amendment issue, taking the district court's position that such a decision may be deferred. We do not agree. Without deciding whether North Carolina was amenable to suit in federal court, the district court determined its authority under Article III and the federal jurisdictional statute, ruling that it had federal jurisdiction over the State entity. It then "turn[ed] to the merits" and called for further briefing on the impact of the FCC's ruling. Finally, it exercised its declared

federal jurisdictional power to remand the case to the NCUC to give it the first opportunity to reach the correct answer, reserving its later right to decide both Eleventh Amendment immunity and the merits. In this same vein, it denied BellSouth's claims for declaratory judgment and injunctive relief *without prejudice* to revisiting the claims. The court stated that it "recognizes that the NCUC may well reach the same decision, but nevertheless, the court wishes to give the NCUC an opportunity to reexamine its conclusions with the benefit of the recent FCC ruling." In deferring its decision on the Eleventh Amendment immunity, the court explained that because it "has found that it has subject matter jurisdiction and has determined that it will remand th[e] matter to the NCUC for further consideration, the court finds it was unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC, and therefore declines to decide that issue *at this time*" (emphasis added).

In taking these steps, the district court asserted federal subject matter jurisdiction over a State without recognizing its sovereign immunity and, in the exercise of that jurisdiction, ordered further briefing, a remand, and the deferral of the Eleventh Amendment immunity issue until the case returned to the court. Its refusal to address the Eleventh Amendment issue at the outset, however, interfered with North Carolina's sovereignty as protected by the Constitutional structure. *See Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2254, 144 L.Ed.2d 636 (1999). This structure excludes States, in the areas of their sovereignty, from the federal exercise of Article III jurisdiction. *See id.* It therefore directly offends State sovereignty to require the States to argue federal jurisdictional issues emanating from Article III when their sovereignty entitles them to protection from federal courts' exercise of Article III power. *See id.* ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" (quoting *Hans v. Louisiana,* 134 U.S. 1, 13, 10 S.Ct.

504, 33 L.Ed. 842 (1890)) (internal quotation marks omitted)); *see also id.* at 2255 (pointing out that sovereignty immunity "pose[s] a bar to federal jurisdiction over suits against nonconsenting States"). In short, the actions taken by the district court in this case violated the essence of the Eleventh Amendment protection: "The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) (quotation marks and citation omitted).

Accordingly, the NCUC, as an agency of the State of North Carolina, is entitled to be dismissed by virtue of its sovereign immunity as protected in federal court by the Eleventh Amendment.

III

Both U.S. LEC and NCUC contend that the district court lacked subject matter jurisdiction over enforcement decisions rendered by the NCUC. They maintain that 47 U.S.C. § 252(e)(6), on which the district court relied for its exercise of jurisdiction, limits the scope of federal review to a special class of State commission determinations made during the "initial approval process" to assure that interconnection agreements comport with the requirements of 47 U.S.C. §§ 251 and 252(d). They argue that Congress did not intend to convert every contract dispute or issue of contract administration into a federal case. They acknowledge that Congress undoubtedly wanted to ensure that interconnection agreements be approved under uniform principles of federal law that apply the traditional utility standards of public convenience and necessity, public interest, and freedom from unjust discrimination. NCUC asserts, however, that there is no reason to find implied federal jurisdiction to ensure that the contracts themselves be subject to uniform interpretation because the

terms of interconnection agreements, which are negotiated by the parties, vary.

As we pointed out in *Bell Atlantic v. MCI Worldcom*, § 252(e)(6) confers jurisdiction on federal courts to review State commission "determinations" made under § 252 "to determine whether the agreement . . . meets the requirements of section 251 and this section [252]." 47 U.S.C. § 252(e)(6). We noted,

> While this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such [interconnection] agreements. With respect to negotiated agreements in particular, the federal review is narrower. The *only* "determination" that can be made by the State commission under § 252 on a negotiated agreement is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any "party aggrieved" to seek review in federal court.

Bell Atlantic v. MCI Worldcom, 2001 WL 123663 (footnote omitted). We demonstrated that Congress intended to reserve non— § 252 determinations made by State commissions for review in State courts as specified by State law. *See id.*

The interconnection agreements subject to these actions were submitted to the NCUC and approved by it, and no judicial review was sought from these State commission determinations. The present disputes involve contract administration and turn on the proper interpretation of these agreements and their proper enforcement. But as we explained fully in *Bell Atlantic v. MCI Worldcom*,

> While this dispute was properly brought before the Maryland commission and decided by it—both

> because of the commission's supervisory and regulatory authority over public service companies operating in Maryland and because of the 1934 Act's general assignment of responsibility to State commissions—the commission's decision was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6).

Id. at [52]. The same must be said in this case. The NCUC has jurisdiction over the administration of interconnection agreements entered into by public utility companies under its jurisdiction. *See* N.C. Gen. Stat. §§ 62-2, 62-30, 62-32, 62-60, 62-74, 62-110(f), 62-133.5. And judicial review of such decisions by the North Carolina state courts is provided by state law as preserved by the 1996 Act. *See* N.C. Gen.Stat. §§ 62-90, 62-96. Accordingly, as to the private parties in this case, the district court erred in asserting federal jurisdiction under 47 U.S.C. § 252(e)(6).

IV

BellSouth relied alternatively for subject matter jurisdiction on 28 U.S.C. §§ 1331 and 1332. Even though the district court did not reach the issue of whether these general jurisdictional provisions authorized federal jurisdiction, because we are reversing the district court's ruling on 47 U.S.C. § 252(e)(6), we must also determine whether the district court had federal jurisdiction under these general jurisdictional statutes.

In *Bell Atlantic v. MCI Worldcom*, we noted that the carefully considered intent of Congress was to provide limited review of State commission decisions in federal court and to leave all other review of State commission decisions to the State courts. Because of this specific congressional intent manifested in the 1996 Act, we stated,

> It would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it never-

theless intended to have 28 U.S.C. § 1331 override this effort.

Bell Atlantic v. MCI Worldcom, 2001 WL 123663.

For this reason and the other reasons given by us in *Bell Atlantic v. MCI Worldcom*, *id.*, we hold that the general jurisdictional statutes do not backfill where Congress otherwise intended to allocate jurisdiction between the States and the federal courts.

V

In sum, these federal actions by BellSouth against the NCUC are barred by the Eleventh Amendment, and North Carolina did not waive that immunity by participating in the regulation of interconnection agreements because Congress did not manifest an intent to condition participation in the federal regulatory scheme upon the States' waiver of Eleventh Amendment immunity.

As to BellSouth's actions against U.S. LEC, Intermedia, and MCImetro, the claims do not fall into the category of suits identified by 47 U.S.C. § 252(e)(6) for resolution in federal court. Such claims are explicitly left by the 1996 Act for resolution by State commissions and for review in State courts, and therefore federal courts have no jurisdiction to decide them. In addition, 28 U.S.C. §§ 1331 and 1332 do not operate to confer jurisdiction over cases from which Congress withheld federal jurisdiction in the 1996 Act.

For these reasons, we vacate the district court's judgment and remand with instructions to dismiss these actions.

VACATED AND REMANDED WITH INSTRUCTIONS

KING, Circuit Judge, dissenting:

For the reasons more fully articulated in my opinion in the companion case, *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 2001 WL 123663 (4th Cir.2001) (King, J., dissenting), I also must dissent in this case. Once again, I heed—and the majority dismisses—the clear admonition of Justice Scalia: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n. 6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). And, again, I agree with the reasoned decisions of our sister circuits that have considered these issues, while the majority isolates itself from them.

In my view, the federal courts possess jurisdiction pursuant to the Telecommunications Act ("Act"), specifically 47 U.S.C. § 252(e)(6), to review the determinations made by State commissions in enforcing interconnection agreements. *See Bell Atlantic Md.*, 2001 WL 123663 (King, J., dissenting); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-97 (10th Cir.2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir.2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied sub nom. Public Serv. Comm'n v. Wisconsin Bell, Inc.*, — U.S. —, 121 S.Ct. 896, — L.Ed.2d — (2001), *and cert. denied sub nom. Illinois Commerce Comm'n v. MCI Telecomms. Corp.*, 121 S.Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir.2000).[1] Moreover, I believe that a State commission waives sovereign immunity by electing to participate in the regulation of local telecommunications under the Act. *See Bell Atlantic Md.*, 2001 WL 123663 (King, J.,

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[1] Because the Act confers jurisdiction on federal courts, it is unnecessary to consider whether general federal question jurisdiction also is provided under 28 U.S.C. § 1331.

dissenting); *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 2001 WL 38281, at *10 (5th Cir.2001); *Illinois Bell*, 222 F.3d at 342; *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir.2000).[2] The majority concludes that the district court, by deferring consideration of the Eleventh Amendment issue, "interfered with North Carolina's sovereignty as protected by the Constitutional structure." *Ante*, at [10a]. Although the district court should have addressed the Eleventh Amendment issue prior to its remand to the State commission, it did not, in my view, interfere with North Carolina's sovereignty.

Because the majority reaches contrary conclusions on these issues, I respectfully dissent.

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[2] Alternatively, the individual members of the State commission could have been—but were not—sued in their official capacities for injunctive relief pursuant to *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See Bell Atlantic Md.*, 2001 WL 123663 (King, J., dissenting); *AT&T Communications*, 238 F.3d 636, 2001 WL 38281, at * 11; *Illinois Bell*, 222 F.3d at 345; *Public Serv. Comm'n*, 216 F.3d at 939; *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied sub nom. Strand v. Michigan Bell Tel.*, — U.S. —, 121 S.Ct. 54, 148 L.Ed.2d 22 (2000).

APPENDIX B-1

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-55, Sub 1094
IN THE MATTER OF
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
Complainant
v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondent

[Filed Feb. 10, 1999]

BEFORE: Commissioner William R. Pittman, Presiding; and Commissioners Ralph A. Hunt and J. Richard Conder

ORDER RULING ON COMPLAINT PROCEEDING INVOLVING INTERCONNECTION AGREEMENT

BY THE COMMISSION: On April 23, 1998, MCImetro Access Transmission Services, Inc. (MCIm or MCImetro) filed a complaint proceeding against BellSouth Telecommunications, Inc. (BellSouth) alleging that BellSouth had violated The Telecommunications Act of 1996 (the Act or TA96) and had failed to meet the terms of the Companies' Interconnection Agreement on 12 specific counts. The Interconnection Agreement entered into between the parties was approved by the Commission on May 12, 1997.

On May 13, 1998, BellSouth filed its Answer and Response to the Complaint requesting that the complaint of MCIm be dismissed. On May 28, 1998, MCIm filed its Response to BellSouth's Answer stating that the

Answer was unacceptable and requesting an expedited hearing.

On June 3, 1998, an Order was issued scheduling the docket for hearing. An evidentiary hearing was held on August 18, 1998. Proposed Orders were filed by the parties on October 1, 1998.

WHEREUPON, the Commission now makes the following

FINDINGS OF FACT

1. BellSouth and MCIm are required to negotiate the initial subset of the Regional Street Address Guide (RSAG) database that will be assembled and provided and the price to be paid by MCIm for this one-time service. The cost of extracting data which BellSouth believes should not be provided with the RSAG database is a cost that should be borne by BellSouth. BellSouth should be required to provide real-time access to updates to the database at no charge.

2. BellSouth is required to provide MCIm with the ability to calculate due dates in the inquiry mode of the Local Exchange Navigation System (LENS) which BellSouth was planning to complete by November, 1998, as well as in the interfaces that are being developed for the future. Additionally, BellSouth is required to integrate the due date intervals and scheduling data to provide MCIm with the ability to display available due dates comparable to that available to BellSouth through the Regional Navigation System (RNS).

3. BellSouth is required to provide a means for MCIm to reserve telephone numbers which MCIm can integrate into its ordering system and reserve the same number of telephone numbers per order as BellSouth. Further, BellSouth is not required to integrate the NXX information which is available in the Local Exchange Routing Guide (LERG) into the ordering system which it provides to MCIm.

4. BellSouth is required to provide MCIm with access to Universal Service Order Code (USOC) information including field identifiers (FIDs) and state validity information on a real-time electronic basis within 45 days. Additionally, BellSouth should provide updates to the USOC information on a real-time basis.

5. BellSouth is required to provide all customer service record (CSR) data specifically outlined in the Interconnection Agreement which does not include pricing data. Additionally, BellSouth may maintain its current freeze procedures for CSRs.

6. BellSouth is not required to provide service jeopardy notification via Electronic Data Interchange (EDI) under the Interconnection Agreement.

7. BellSouth is not required to systematically disclose the details of its internal Operations Support Systems (OSS) to MCIm under the Interconnection Agreement or the Act. To the extent that the information provided in Docket No. P-55, Sub 1022 is lacking or indicates the need for further investigation of BellSouth's OSS, the Commission will conduct its own inquiries with appropriate safeguards.

8. BellSouth is required to make available to MCIm the same network blocking data that BellSouth produces for its own use.

9. BellSouth has provided the information requested since the complaint was filed that may enable MCIm to interconnect at BellSouth's local tandems. Accordingly, no further action by the Commission is necessary at this time.

10. BellSouth has fulfilled its obligations under the Interconnection Agreement and the Act concerning access to directory listing information.

11. BellSouth is required to pay MCIm reciprocal compensation on traffic terminated to Internet Service Providers (ISPs), going forward and all amounts

past due, plus interest under the Interconnection Agreement.

12. BellSouth should alter its soft dial tone message within 30 days of the issuance of the Commission Order to read as follows:

> "You may only dial 911 from this line. To establish telephone service, you must call from another location."

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

Issue: Has BellSouth provided MCImetro with the RSAG in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has refused to provide a download of the RSAG database. The provision of limited access to this database through LENS does not comply with BellSouth's contractual obligations. BellSouth should be ordered to provide a database download within 10 days after the Commission Order with daily updates thereafter.

BELLSOUTH: Yes. The Interconnection Agreement does not require BellSouth to provide a download of RSAG. The Interconnection Agreement is silent on who pays for such a download, even if it were required. BellSouth has recently been ordered by the Georgia Public Service Commission to provide a download for the RSAG data, and BellSouth will be providing the download in the near future. However, MCImetro should be required to reimburse BellSouth for the cost of the project.

PUBLIC STAFF: No. BellSouth should provide a one-time download of the RSAG to MCImetro at a price to be negotiated. BellSouth should also provide updates

of the RSAG to MCImetro on a real-time basis at no charge.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsection 2.1.3.1, of the Interconnection Agreement which reads as follows:

> "Within thirty (30) days after the Effective Date of this Agreement, BellSouth shall provide to MCIm the Street Address Guide (SAG) data, or its equivalent, in electronic form. All changes to the SAG shall be made available to MCIm on the same day as the change to the data is made."

BellSouth witness Hendrix referenced Attachment VIII, Subsection 2.3.2.5 of the Interconnection Agreement which reads as follows:

> "At MCIm's option, BellSouth will provide MCIm the capability to validate addresses by access to BellSouth's Regional Street Address Guide (RSAG) via dial-up or LAN [local area network] to WAN [wide area network] access. Implementation time frames will be negotiated between the parties."

According to the direct testimony of MCIm witness Turner, by letter dated December 2, 1997, BellSouth proposed to provide an extract of the RSAG database based on the following cost structure: $30,000 for a project plan, a time line, and a final proposal; $538,030 for total start-up costs for the new connections; and $8,650 per month on an ongoing basis. By letter dated December 16, 1997, MCIm rejected BellSouth's proposal since it is MCIm's position that the Interconnection Agreement requires BellSouth to provide the RSAG download free of charge.

MCIm witness Turner further stated in direct testimony that currently BellSouth requires Competing Local Providers (CLPs) to access the RSAG through

LENS or Interexchange Carrier Reference Validation (ICREF). Witness Turner stated that he believes that the most important pre-order function is address validation and that recently, BellSouth has acknowledged that an invalid address constitutes the second most common reason for order rejection. Witness Turner argued that MCIm needs the download of RSAG in order for MCIm to be able to electronically enter the information into its own system so that MCIm's customer service representatives would not have to use the BellSouth system and then re-enter the data manually into the MCIm system.

In rebuttal testimony, witness Turner stated that it has always been MCIm's position that under the Interconnection Agreement, BellSouth is required to provide MCIm a download of the RSAG at no additional cost. Concerning BellSouth witness Stacy's testimony that, "based on the volume of data involved, it is inconceivable that BellSouth would ever have agreed to provide MCImetro or any other CLP a download of RSAG data", MCIm witness Turner stated that the language in the contract is clear. BellSouth witness Stacy stated that two extracts from the total RSAG database comprise nearly 400 million bytes (characters) of data and that the nightly download of data would fill in excess of 125,000 printed pages. MCIm witness Turner further stated that the AT&T and BellSouth Interconnection Agreement states that BellSouth is required to provide a "download" of the RSAG, so it is witness Turner's position that BellSouth's volume argument fails to hold water.

During cross-examination, witness Turner agreed that the Georgia Commission required BellSouth to provide CLPs with a download of the RSAG data in the context of an OSS workshop, and not a complaint proceeding involving an interconnection agreement. Witness Turner also testified that the Georgia Commission's Order speaks to the download itself and does not resolve the issue of cost. BellSouth attorney Mr. Carver

stated that it is BellSouth's position that the RSAG data is maintained in such a way that if it is downloaded, BellSouth would have to download it for all nine states, not just for Georgia, which was a fact that witness Turner was not aware of. However, witness Turner maintained that it is MCIm's position that the Interconnection Agreement requires BellSouth to provide the download at no cost to MCIm. Mr. Carver postured that MCIm is asking the North Carolina Utilities Commission to come up with a different answer to the same question that is before the Georgia Commission and "sort of preempt Georgia as to the North Carolina data".

BellSouth witness Stacy stated in his prefiled testimony that he believes that BellSouth is not required to provide a download of the RSAG database under the Interconnection Agreement. Witness Stacy argued that MCIm witness Martinez failed to reference another subsection of the Interconnection Agreement which provides convincing evidence that BellSouth intended to provide MCIm access to the RSAG electronically and not through a download of the RSAG database. Witness Stacy pointed out that Subsection 2.1.1.2 states:

> "For resale purposes, BellSouth shall provide real time electronic interfaces ("EI") for transferring and receiving Service Orders and Provisioning data and materials (e.g., access to Street Address Guide ("SAG") and Telephone Number Assignment database). These interfaces shall be administered through a gateway that will serve as a point of contact for the transmission of such data from MCIm to BellSouth, and from BellSouth to MCIm."

Witness Stacy concluded that based on Subsection 2.1.1.2, it is clear that access to RSAG was intended to be provided via electronic interface such as through LENS and was never contemplated to be provided as a "download" of the entire database.

However, witness Stacy also noted in his testimony that BellSouth has been ordered by the Georgia Public Service Commission to provide a download of the RSAG in the context of its OSS dockets. Witness Stacy further stated that BellSouth will provide a download of the RSAG data for Georgia and for every other state in BellSouth's region, which includes North Carolina. According to BellSouth, the only question that appears to remain in dispute is if MCIm should pay for the cost of BellSouth downloading the RSAG to MCIm. Witness Stacy stated that the Georgia Commission created a mechanism for BellSouth to recover the cost of implementing the requirements of the OSS Order. However, MCIm witness Turner stated in direct testimony that MCIm is pursing this issue in North Carolina because according to the Interconnection Agreement, MCIm is entitled to the download at no cost. Witness Stacy confirmed in his summary at the hearing that this issue is moot as far as BellSouth is concerned since BellSouth has agreed to furnish the RSAG database to MCIm reserving the right to negotiate the price for that service.

Witness Stacy confirmed on cross-examination that the Georgia Commission's Order does not state that it was necessarily going to give BellSouth any cost relief for the download of the RSAG.

The Public Staff, in its Proposed Order, stated that it recognizes the critical nature of the address validation function and sympathizes with MCIm's desire to perform the function in house. The Public Staff also stated that it agrees with MCIm that Attachment VIII, Subsection 2.1.3.1 of the Interconnection Agreement does require BellSouth to provide the SAG data itself in electronic form, which the Public Staff believes would appear to include a download of the database. The Public Staff expressed sympathy with BellSouth that the download would involve a tremendous volume of data and would be costly to assemble for download to MCIm. However, the Public Staff concluded that it is

consistent with the Interconnection Agreement to require the parties to negotiate the initial subset of the RSAG database that will be assembled and provided under the Interconnection Agreement and the price to be paid by MCIm for this one-time service. The Public Staff also recommended that the cost of extracting data which BellSouth believes should not be provided with the RSAG database is a cost which should be borne by BellSouth. Finally, the Public Staff recommended that the Commission require BellSouth to provide updates to the initial downloaded database on a real-time basis pursuant to Subsection 2.3.2.5 of Attachment VIII of the Interconnection Agreement at no charge.

The Commission also acknowledges the importance of the RSAG database to MCIm in its provision of service to its customers. The Commission agrees with the Public Staff that the Interconnection Agreement, Attachment VIII, Subsection 2.1.3.1 specifically and clearly states that BellSouth will provide the SAG data to MCIm in electronic form; however, the Commission does not necessarily agree with the Public Staff that electronic form would include a download of the database. Nevertheless, BellSouth has stated in the record that it will provide a download of the RSAG to all nine BellSouth states based on the decision from the Georgia Commission and that the only issue that remains in dispute is the cost of the download. The Commission notes that the Interconnection Agreement is silent on the issue of cost todownload the RSAG. Therefore, the Commission believes that the Public Staff's recommendation in this regard (i.e. that the parties negotiate the initial subset of the RSAG database that will be assembled and provided and the price to be paid by MCIm for this one-time service) is reasonable. The Commission also believes that the Public Staff's recommendation that the Commission require BellSouth to provide updates on a real-time basis at no charge is appropriate.

CONCLUSIONS

The Commission concludes that BellSouth and MCIm should negotiate the initial subset of the RSAG database that will be assembled and provided and the price to be paid by MCIm for this one-time service. The Commission also concludes that the cost of extracting data which BellSouth believes should not be provided with the RSAG database is a cost which should be borne by BellSouth. Finally, the Commission concludes that BellSouth should be required to provide MCIm with real-time access to updates in the database at no charge.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

Issue: Has BellSouth provided MCImetro with the due date calculation for a service order request from a customer in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has not provided MCImetro with parity in the calculation of due dates. BellSouth should be ordered to provide MCImetro with the same capability to calculate due dates that BellSouth has for itself, through a system that can be integrated with MCImetro's ordering system, within 30 days of the issuance of the Commission Order.

BELLSOUTH: Yes. MCImetro can use the firm order mode of LENS or Common Gateway Interface (CGI) to receive a calculated due date. A BellSouth service representative using RNS or Direct Order Entry (DOE) inquiring about the available due dates without "building" a complete service order views the same installation calendar that is provided to CLPs via LENS, CGI, (sometimes referred to as LENS CGI), and EC-Lite (The

"EC" in EC-Lite stands for electronic communications). BellSouth provided the LENS CGI specifications to MCImetro two months prior to this complaint being filed and updated specifications in April, 1998. BellSouth is planning to add due date calculations to the LENS inquiry mode in November, 1998.

PUBLIC STAFF: No. BellSouth should provide to MCImetro the same capability to calculate due dates that BellSouth has with RNS through a system that can be integrated with MCImetro's ordering system.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsections 2.1.1.2 and 2.3.1.3 of the Interconnection Agreement which read as follows:

> Subsection 2.1.1.2: "During the term of this Agreement, BellSouth shall provide necessary ordering and provisioning business process support as well as those technical and systems Interfaces as may be required to enable MCIm to provide at least the same level and quality of service for all resale services, functions, features, capabilities, and Unbundled Network Elements as BellSouth provides itself, its Affiliates or its own subscribers. BellSouth shall provide MCIm with the same level of ordering and provisioning support as BellSouth provides itself in accordance with standards and performance measurements that are at least equal to the highest level of standards and/or performance measures that BellSouth uses and/or which are required by law, regulatory agency, or by BellSouth's own internal procedures, whichever are the most rigorous. These standards shall apply to the quality of the technology, equipment, facilities, processes, and techniques (including, but not limited to, such new architecture, equipment, facilities, and interfaces as BellSouth may deploy) that BellSouth provides to MCIm under this Agreement.

> For resale purposes, BellSouth shall provide real time electronic interfaces ("EI") for transferring and receiving Service Orders and Provisioning data and materials (e.g., access to Street Address Guide ("SAG") and Telephone Number Assignment database). These interfaces shall be administered through a gateway that will serve as a point of contact for the transmission of such data from MCIm to BellSouth, and from BellSouth to MCIm. The implementation of such data transfer system shall be negotiated in good faith by the parties and be specified in a written agreement between MCIm and BellSouth that will be completed expeditiously after the Effective Date of this Agreement. MCIm and BellSouth agree to use best efforts to provide the Electronic Communications Gateway described above as soon as practicable, but in no event later than April 1, 1997. In addition, (1) [sic] BellSouth agrees to use its best efforts to carry outs [sic] its responsibilities under this Section, and (ii) MCIm agrees to use its best efforts to carry out its responsibilities under this Section. BellSouth warrants that interim solutions shall provide MCIm Customers with the same level of service available to BellSouth customers."
>
> Subsection 2.3.1.3: "BellSouth and MCIm shall agree on and implement interim solutions for each interface within thirty (30) days after the Effective Date of this Agreement, unless otherwise specified in Exhibit A of this Attachment. The interim interfaces(s) shall, at a minimum, provide MCIm the same functionality and level of service as is currently provided by the electronic interfaces used by BellSouth for its own systems, users, or subscribers."

BellSouth witness Hendrix referenced Attachment VIII, Subsection 2.2.4.3 of the Interconnection Agreement which reads as follows:

"BellSouth shall supply MCIm with due date intervals to be used by MCIm personnel to determine service installation dates."

According to MCIm witness Turner, the due date function enables a customer service representative to inform a customer when his or her service will be turned up. Additionally, according to witness Turner, RNS automatically shows the first available due date on the screen and because a BellSouth order flows immediately from pre-ordering to ordering, the due date calculation will not have changed by the time the order is submitted; therefore, the due date can be quoted much more confidently to the customer. Witness Turner argued that BellSouth does not provide the same due date functionality to MCIm. Witness Turner stated that LENS has no method of calculating due dates for unbundled network element (UNE) orders.

In rebuttal testimony, witness Turner argued that BellSouth witness Stacy's position that BellSouth provides installation intervals for UNEs is true, but that such intervals by themselves do not give MCIm anything like the automated due date calculation function that BellSouth has. Witness Turner argued that for CLPs that do not intend to use LENS for ordering, such as MCIm, calculating due dates in the firm order mode of LENS is not a viable option, as offered by BellSouth witness Stacy. Witness Turner also pointed out that BellSouth witness Stacy acknowledged that BellSouth still has not developed a due date calculation function in the inquiry mode of LENS which means that a CLP customer service representative still must perform a manual due date calculation. Witness Turner concluded that this requirement is discriminatory. Finally, witness Turner stated that BellSouth witness Stacy's recommendation that CLPs do their own programming to calculate due dates based on information provided in the inquiry mode of LENS is unacceptable because it is

unreasonable to expect CLPs to make such an investment in a proprietary and inadequate pre-ordering system.

BellSouth witness Stacy stated in prefiled testimony that BellSouth has provided MCIm with the due date calculation for a service order request from a customer in compliance with the Interconnection Agreement. Witness Stacy further statedthat due dates are not needed for the majority of orders, only for orders requiring a premises visit. Witness Stacy maintained that if MCIm used the firm order mode of LENS or CGI to order resale services or UNEs, it will receive a calculated due date, just as RNS provides to BellSouth. Further, witness Stacy maintained, a CLP can obtain due date information on services requiring a premises visit from Direct Order Entry Support Applications Program (DSAP) through the inquiry mode of LENS. MCIm may, according to witness Stacy, integrate pre-ordering functionality with EDI and its own internal OSS by using the LENS CGI specification, which allows CLPs to build a machine-to-machine interface to LENS, or by using EC-Lite, another machine-to-machine pre-ordering interface provided by BellSouth. Witness Stacy stated that it is his understanding that MCIm is using LENS CGI to obtain CSRs, but is not using it to perform any other pre-ordering or ordering functions. Witness Stacy stated that the characterizations of the due date capabilities provided to MCIm through LENS as stated by MCIm witness Turner in prefiled testimony are inaccurate or misleading. Witness Stacy concluded that BellSouth is providing CLPs access to due dates in substantially the same time and manner as BellSouth provides to itself and that CLPs are free to build any system they choose to support their unique vision of customer service and to incorporate the pre-ordering and ordering functions in that OSS. Witness Stacy also noted that since the Georgia Public Service Commission has ordered BellSouth to add due date calculation to the LENS inquiry mode, BellSouth plans to complete this by November, 1998.

During cross examination, witness Stacy maintained that due date calculations are available through LENS (both in the browser mode and the CGI mode) and EC-Lite. Witness Stacy further agreed that EC-Lite was specifically developed for AT&T and that EC-Lite is available to all other carriers, however, no other carriers have developed it. Witness Stacy also acknowledged that MCIm intends to use EDI for ordering and that the EDI ordering interface does not provide a due date calculation function. However, witness Stacy stated that EDI has been a national standard interface for about twelve more months and that a CLP could use EC-Lite to get the due date calculation. He further agreed that MCIm would have to use LENS in a browser mode or CGI mode to get due date calculations. Witness Stacy also acknowledged that using the inquiry mode of LENS, a CLP representative has to perform the due date calculation itself for a new installation and that a BellSouth representative using RNS has the next available due date highlighted on the screen.

The Public Staff, in its Proposed Order, stated that it is mindful of the need to strike a balance between BellSouth's duty to provide capabilities to MCIm through electronic interfaces and MCIm's responsibility to develop its own capabilities in its internal systems. The Public Staff concluded that the capabilities currently provided by BellSouth in the case of due date calculations for service order requests are inadequate for the reasons expressed by MCIm and fall to satisfy the parity requirements of the Interconnection Agreement. The Public Staff recommended that the Commission find that BellSouth should be required to provide MCIm with the ability to calculate due dates in the inquiry mode of LENS, as it is already planning to do, as well as in the interfaces that are being developed. The Public Staff also maintained that the function should include UNEs. Finally, the Public Staff recommended that BellSouth should be required to integrate the due date intervals and scheduling data to provide MCIm

with the ability to display available due dates comparable to that provided in RNS.

The Commission agrees with the position taken by the Public Staff that the current capabilities for due date calculations are inadequate and fall to provide parity as required under the Interconnection Agreement. The Commission believes that it is appropriate to require BellSouth to provide MCIm with the ability to calculate due dates in the inquiry mode of LENS which BellSouth was planning to complete by November, 1998, as well as in the interfaces that are being developed for the future. Additionally, the Commission believes that it is reasonable to require BellSouth to integrate the due date intervals and scheduling data to provide MCIm with the ability to display available due dates comparable to that available to BellSouth through RNS.

CONCLUSIONS

The Commission concludes that it is appropriate to require BellSouth to provide MCIm with the ability to calculate due dates in the inquiry mode of LENS which BellSouth was planning to complete by November, 1998, as well as in the interfaces that are being developed for the future. Additionally, the Commission concludes that it is appropriate to require BellSouth to integrate the due date intervals and scheduling data to provide MCIm with the ability to display available due dates comparable to that available to BellSouth through RNS.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

Issue: Has BellSouth provided MCImetro with access to telephone numbers and telephone number information in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has not provided MCImetro with parity in the reservation of telephone numbers or in access to NXX information. BellSouth should be ordered to provide MCImetro with parity for these functions within 30 days of the date of the Commission Order.

BELLSOUTH: Yes. CLPs may reserve up to six numbers at a time in LENS or CGI for an unlimited number of times per session, which yields an unlimited number of reservations. Using EC-Lite, a CLP may reserve up to 25 numbers per session, the same as RNS and DOE allow. BellSouth plans to enhance LENS and CGI in November, 1998 to allow the selection of a maximum of 25 numbers at a time.

PUBLIC STAFF: No. BellSouth should provide MCImetro with the same access to telephone numbers that BellSouth has with its own ordering system, through a system that can be electronically integrated with MCImetro's ordering system. BellSouth should not be obligated to provide to MCImetro the NXX information that can be found in the LERG.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsection 2.1.8.1 of the Interconnection Agreement which reads as follows:

> Subsection 2.1.8.1: "Until Number Administration functions are assumed by a neutral third party in accordance with Federal Communications Commission (FCC) Rules and Regulations, Incumbent Local Exchange Carrier (ILEC) shall assign NXXs to MCIm on a non-discriminatory basis in accordance with national guidelines. BellSouth shall provide the same range of number choices allowing the assignment of numbers while the subscriber is on the phone to MCIm, including choice

of exchange number, as BellSouth provides its own subscribers. Reservation and aging of numbers shall remain BellSouth's responsibility."

BellSouth witness Hendrix referenced Part A, Section 13.5 of the Interconnection Agreement wherein BellSouth agrees to, "provide nondiscriminatory access to telephone numbers for as long as BellSouth remains the code administrator for the North American Numbering Plan." Witness Hendrix also referenced Subsection 2.1.8 of the Interconnection Agreement.

MCIm witness Turner stated in direct testimony that BellSouth does not provide nondiscriminatory access to the telephone number reservation function. Witness Turner argued that LENS does not permit MCIm to integrate the telephone number reservation function with its ordering system. According to witness Turner, for BellSouth's RNS and DOE systems, the telephone number reservation function is integrated with the ordering function which is not the case for MCIm using LENS. Additionally, witness Turner stated that with LENS, the customer service representative can only reserve a maximum of six telephone numbers at a time for a customer, compared to 25 telephone numbers that can be reserved by BellSouth for its customers. Finally, according to witness Turner, a CLP has no way of viewing the NXX codes in offering customers a choice of numbers while BellSouth representatives using RNS can easily view such codes. Witness Turner maintained that this is also true in BellSouth's business system, DOE, with the comparable screen in LENS. Witness Turner concluded that MCIm is seeking to have the Commission: (1) require BellSouth to permit MCIm to reserve telephone numbers through a system that can be integrated with MCIm's ordering system; (2) require BellSouth to permit MCIm to reserve the same number of telephone numbers per order as BellSouth; and (3) to require BellSouth to provide the same NXX information to MCIm that is provided to BellSouth representatives.

In rebuttal testimony, witness Turner argued that BellSouth witness Stacy himself acknowledged that BellSouth's customer service representatives using RNS or DOE may reserve up to 25 telephone numbers while CLP customer service representatives using LENS may only reserve six at a time in LENS. Witness Turner also maintained that this same limitation also exists in LENS when enhanced by CGI. Witness Turner also stated that it appears that BellSouth witness Stacy has acknowledged that BellSouth customer service representatives have access to available NXX codes through OSS, while CLPs do not have such access through LENS, however, that witness Stacy did not provide justification for the disparity. Witness Turner stated that BellSouth witness Stacy's recommendation that CLPs incorporate the LERG into their own systems ignores the fact that the LERG is massive and incorporating the LERG into CLPs' OSS systems for on-line access would not be a practical undertaking. Finally, witness Turner pointed out that BellSouth witness Stacy does not dispute that its customer service representatives using RNS have access to pre-selected telephone numbers, whereas CLP customer service representatives using LENS do not. Witness Turner maintained that this disparity is unacceptable.

During cross-examination, witness Turner affirmed that during a LENS session, a customer service representative can go into the screen multiple times and get six numbers each time, clarifying that a customer service representative must go back out and back in to request another six numbers. Also during cross-examination, witness Turner agreed that the number selection issue will only come into play with a customer that doesn't have a telephone number already, and witness Turner agreed that would only be in the minority of situations.

BellSouth witness Stacy stated in prefiled testimony that BellSouth uses RNS for residence customers and DOE for business customers to select telephone

numbers for retail customers and that by using RNS or DOE, the BellSouth service representative sends inquires to and receives responses from the BellSouth database (Application for Telephone Number Load Administration and Selection — ATLAS) containing telephone numbers. Witness Stacy maintained that CLPs perform telephone selection in a way similar to BellSouth by using LENS, CGI, or EC-Lite, and in several respects, the special number capabilities of LENS, CGI, and EC-Lite provide advantages over those available to BellSouth's retail service representatives. Concerning reservation of telephon numbers, witness Stacy maintained that CLPs may reserve up to six numbers at a time using LENS or CGI for an unlimited number of times per session and using EC-Lite may reserve up to 25 numbers per session, the same as RNS and DOE allow. However, witness Stacy stated that BellSouth plans to enhance LENS and CGI in November, 1998 to allow the selection of a maximum of 25 numbers at a time. Witness Stacy also refuted MCIm witness Turner's assertion that CLPs have no way of viewing the NXX codes available to the customers by stating that the LERG contains that information. Witness Stacy further stated that MCIm may take the information found in the LERG and incorporate it into its front end sales negotiation system and that building such capability is one of the advantages and responsibilities that a CLP has when it makes the business decision to do machine-to-machine interface. Finally, concerning MCIm witness Turner's assertion that BellSouth, using RNS, can view a pre-selected telephone number that may be accepted if approved by a customer while LENS does not, witness Stacy argued that MCIm could develop a similar presentation system for its own internal sales negotiation OSS.

Witness Stacy, during cross-examination, stated that a BellSouth representative using RNS and DOE can reserve 25 telephone numbers on a screen for an unlimited number in the session. Witness Stacy further

agreed that a MCIm representative using LENS can reserve up to six telephone numbers at a time for an unlimited number in each session while EC-Lite allows a reservation of 25 at a time up to an unlimited number. Witness Stacy stated that well over 95% of the orders require five numbers or less. Witness Stacy further agreed that a BellSouth representative using RNS or DOE can see a list of all NXXs that serve a customer's address while a MCIm representative using LENS does not see a similar list.

The Public Staff, in its Proposed Order, stated that it believes that MCIm's assertions have considerable merit. The Public Staff recommended that the Commission conclude that BellSouth should provide a means for MCIm to reserve telephone numbers that can be integrated with MCIm's ordering system and to reserve the same number of telephone numbers per order as BellSouth. Finally, the Public Staff stated that since NXXs are available to MCIm through the LERG, the Public Staff recommended that the Commission find that BellSouth is not obligated to integrate this information into the ordering system which it provides to MCIm.

The Commission agrees with the Public Staff that MCIm's arguments in this regard have merit. The Commission believes that it is important for MCIm to be able to integrate into its ordering system a means to reserve telephone numbers and also to reserve the same number of telephone numbers per order at parity with BellSouth. However, the Commission does not believe that it is BellSouth's responsibility to integrate the information with MCIm's ordering system. Therefore, the Commission concludes that BellSouth should be required to provide a means for MCIm to reserve telephone numbers which MCIm can than integrate with its ordering system and reserve the same number of telephone numbers per order as BellSouth. The Commission further believes that BellSouth is not required to integrate the NXX information which is available in

the LERG into the ordering system which it provides to MCIm under the Interconnection Agreement.

CONCLUSIONS

The Commission concludes that BellSouth should be required to provide a means for MCIm to reserve telephone numbers which MCIm can integrate with its ordering system and reserve the same number of telephone numbers per order as BellSouth. The Commission further concludes that BellSouth is not required to integrate the NXX information which is available in the LERG into the ordering system which it provides to MCIm under the Interconnection Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

Issue: Has BellSouth provided MCImetro with access to USOCs in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. While BellSouth has provided MCImetro with USOC information in a usable electronic format, BellSouth has not provided such access to FID information. BellSouth should be ordered to provide MCImetro a FID file with descriptions, together with information on the states in which USOCs are valid, all within 30 days of the issuance of the Commission Order.

BELLSOUTH: Yes. BellSouth uses RNS and DOE, and CLPs use LENS or FC-Lite to obtain USOCs from the same Product/Services Inventory Management System (P/SIMS) and Central Office Features File Interface (COFFI) databases. USOCs are also made available on BellSouth's Interconnection Web Site. The Interconnection Agreement does not require BellSouth to provide the requested USOC information.

PUBLIC STAFF: No. BellSouth should provide MCImetro with USOC information, including FIDs and state validity, in a format that can be downloaded into an MCImetro database.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsections 2.1.1.2 and 2.3.1.3 of the Interconnection Agreement (see Pages [27a-28a] of this Order for the text of the Subsections).

BellSouth witness Hendrix stated in prefiled testimony that access to USOCs is not addressed in the Interconnection Agreement.

According to MCIm witness Turner in his direct testimony, USOCs are codes that correspond to BellSouth service features. Witness Turner maintained that BellSouth has acknowledged that it is essential for CLPs to have accurate information on USOCs and FIDs so CLPs can place valid orders and that USOC and FID errors are the most common cause of rejected orders. Witness Turner stated that there are thousands of USOCs and that in order to have accurate information on USOCs and FIDs, a CLP must know the states in which a specific USOC is valid and which FIDs are associated with each USOC. BellSouth provides USOCs and FIDs in the Local Ordering Guide (LEO) and the USOCs on their web site. However, according to witness Turner, the web site does not indicate the states in which the USOCs are valid or FID information. Therefore, to get complete information, the LEO also must be used. Witness Turner maintained that the process of referencing two different sources is cumbersome and inefficient. Witness Turner recommended that the Commission: (1) order BellSouth to provide MCIm via fixed format Network Data Mover (NDM) a description or definition of each of its USOCs, including the FIDs and their descriptions and the states in which the USOCs are valid; (2) order BellSouth to update this

information on a biweekly basis; and (3) order BellSouth to give notice of the implementation or deactivation of a USOC 45 days in advance.

In rebuttal testimony, witness Turner stated that BellSouth's suggestion, that MCIm can integrate FIDs and state validity data with the downloadable USOC information BellSouth provides, was unsupported by BellSouth.

In his summary at the hearing, witness Turner stated that BellSouth has recently provided USOC information to MCIm in a usable format, however, BellSouth still has not provided information on the FIDs or on the particular states in which a particular USOC is valid.

BellSouth witness Stacy stated in prefiled testimony that BellSouth obtains USOC information through RNS and DOE which retrieves USOC information from the P/SIMS and COFFI databases. Witness Stacy asserted that CLPs may use LENS or EC-Lite to obtain USOCs from the P/SIMS and COFFI databases. However, using EC-Lite or LENS CGI, CLPs can integrate this information with the EDI ordering interface. Witness Stacy also stated that BellSouth has made USOC data along with the associated FIDs available to CLPs in three forms: (1) through the LEO Guide which is also available on BellSouth's web site; (2) a list which has been provided to the CLPs including MCIm; and (3) in the Service Order Error Routine (SOER) edits which are also available on BellSouth's web site. Finally, witness Stacy maintained that BellSouth has made two work aids available to CLPs: the BellSouth Work Aid for Ordering Simple Services and the BellSouth Work Aid for Ordering Complex Services which are also available through the BellSouth web site. Witness Stacy maintained that for several months, CLPs have been able to download the USOCs on a machine-to-machine basis from the BellSouth website which CLPs could use to integrate and correlate this information, along with the information provided by the LEO Guide or the SOER

edits, into their front-end, pre-ordering systems. Concerning USOC errors, witness Stacy stated that "some CLPs have demonstrated the ability to achieve more than 90% flow-through on their electronic orders submitted to BellSouth, which is comparable to BellSouth's rate".

Witness Stacy stated during cross-examination that BellSouth has provided the FID and state validity information to MCIm on paper and in an electronic format, but not in the format requested by MCIm. Witness Stacy also testified that BellSouth intends to provide the information in the future, however, BellSouth does not believe that it is a requirement of the Interconnection Agreement. Witness Stacy stated that the information may be provided late in the first quarter of 1999, but that he did not have an exact date. Witness Stacy also agreed that BellSouth representatives do not have to look up the information as CLP representatives do because the information is put together by BellSouth's retail unit and it is built into BellSouth's ordering process. Witness Stacy did agree that USOC errors are still the single biggest source of rejects.

The Public Staff, in its Proposed Order, stated that it believes that BellSouth's provision of USOC information to MCIm continues to fall short of parity of access. The Public Staff maintained that FIDs and state validity information are essential to the processing of correct orders. The Public Staff maintained that until the information is provided in a format that can be integrated into MCIm's ordering systems, BellSouth's customer service representatives will enjoy an advantage over MCIm's representatives insofar as the ordering process is concerned. The Public Staff also asserted that while automation may not be required for accuracy, it clearly minimizes the potential for human error. The Public Staff recommended that the Commission conclude that BellSouth should be required to provide MCIm with USOC information, including FIDs and state validity

information, in a format that can be downloaded into a MCIm database no later than December 31, 1998, and thereafter to update this information on a biweekly basis and give 45 days notice of the implementation or deactivation of a USOC.

The Commission believes that the record of evidence indicates that access to complete and accurate USOC information with FIDs and state validity information is critical for MCIm to be able to construct accurate orders. However, the Commission does not believe that the Interconnection Agreement requires BellSouth to provide such data in a format that can be downloaded into a MCIm database. The Commission believes that BellSouth should provide the USOC information with FIDs and state validity information on a real-time electronic basis to MCIm. Updates should also be provided on a real-time basis.

CONCLUSIONS

The Commission concludes that BellSouth should provide USOC information including FIDs and state validity information on a real-time electronic basis to MCIm as soon as practicable. The Commission further finds that 45 days is more than an adequate amount of time for BellSouth to provide this information. Additionally, the Commission concludes that BellSouth should provide real-time updates to the USOC information.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

Issue: Has BellSouth provided MCImetro with CSR information in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has failed to provide MCImetro with access to all CSR data, including, for example, price information associated with a customers services. BellSouth should be ordered to provide MCImetro with access to complete CSR data within 30 days of the issuance of the Commission Order.

BELLSOUTH: Yes. MCImetro has electronic access to CSR information via the LENS, CGI, and EC-Lite pre-ordering interfaces, consistent with the Interconnection Agreement. CLPs have machine-to-machine access to CSRs using CGI or EC-Lite, allowing CLPs to electronically transfer CSR information into EDI and/or their own OSS. BellSouth is providing the CSR information required by the Interconnection Agreement unless it is not authorized by the customer to release it.

PUBLIC STAFF: No. BellSouth should provide MCImetro with CSR data for all customers, including pricing information, unless prohibited by the customer, such that MCImetro can populate an order form using EDI.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsection 2.3.2.3 of the Interconnection Agreement which reads as follows:

> Subsection 2.3.2.3: "BellSouth shall provide MCIm with Customer Service Records, including without limitation, Customer Proprietary Network Information (CPNI), except such information as BellSouth is not authorized to release either by the customers or pursuant to applicable law, rule or regulation, as follows: . . . ."

According to MCIm witness Turner, BellSouth has made a decision not to include all of the information in its CSRs in LENS. Witness Turner argued that LENS

does not provide access to CSRs at parity. Witness Turner concluded that it is not for BellSouth to decide that CLPs do not need information to which BellSouth itself has access. Witness Turner also maintained that BellSouth's prohibition of CLPs from access to "restricted" CSRs, even after MCIm has obtained the customer's express permission to obtain access, is improper and discriminatory. Witness Turner stated that BellSouth will not release restricted CSRs until it has directly spoken to the customer. Witness Turner requested that the Commission require BellSouth to provide MCIm with access to all CSR data, except such data as BellSouth can prove it is not authorized to release by its customers or under applicable law, rule, or regulation.

In rebuttal testimony, witness Turner maintained that BellSouth witness Stacy acknowledged that BellSouth provides CSR databases on its determination of what CLPs need to provision telephone service and limits the number of pages that CLPs may obtain electronically through LENS and that BellSouth does not currently provide pricing information. Witness Turner further stated that BellSouth's procedure of prohibiting CLPs from access to "restricted" CSRs until after BellSouth has actually spoken to the customer is improper and discriminatory. Witness Turner stated that it has taken BellSouth seven to 30 days to lift the restriction on requested CSR data.

Witness Turner also rebutted BellSouth witness Stacy's testimony that BellSouth should be able to strip off pricing information from the CSRs it provides to CLPs. Witness Turner maintained that BellSouth witness Stacy stated that the pricing information is not proprietary and witness Turner concluded that the only reason for excluding this information is to have CLPs derive the same information from other sources. Witness Turner stated that this process makes the CLPs' pre-ordering process more expensive and time-consuming. Witness Turner also stated that the

Georgia Public Service Commission rejected similar arguments by BellSouth and required BellSouth to include pricing information in the CSRs provided to CLPs.

During cross examination, witness Turner agreed that BellSouth does provide some CSR information to MCIm. Witness Turner also testified that MCIm only identified price as an item which MCIm was not receiving from BellSouth. Witness Turner also testified that the marketing and sales people are the ones that have specifically requested the information.

Witness Turner also clarified during cross-examination that it is MCIm's position that if MCIm, through a letter of authorization (LOA), states that a customer wants their CPNI released, BellSouth should release the information without having to talk directly to the customer before releasing their CPNI. When asked whether the issue of CSRs was decided by this Commission in the Section 271 Docket, witness Turner testified that he really did not know. However, he further testified that he would ask the Commission to consider this request based on this filing.

BellSouth witness Stacy maintained in prefiled testimony that BellSouth provides all data elements, via LENS, CGI, or EC-Lite, necessary for a CLP to provision telephone service. Witness Stacy presented a list of 10 elements that are provided to CLPs. Witness Stacy stated that CLPs are restricted from certain customer accounts, specifically accounts in which the BellSouth retail customer notifies BellSouth to restrict access to their account information. Additionally, witness Stacy stated that BellSouth's pricing information does not appear on the CSRs obtained by CLPs since this information is not necessary for CLPs to order, provision, maintain, or bill for resold services or UNEs provided to them by BellSouth. Witness Stacy concluded that this information is not needed for provisioning purposes, but that CLPs apparently want the information for marketing purposes, and that CLPs

should not be given BellSouth's marketing information inherent in pricing data at the customer level. Concerning MCIm witness Turner's assertion that BellSouth takes seven to 30 days to provide MCIm with CSRs for which MCIm has submitted a LOA, witness Stacy stated that since no specific information was provided by witness Turner, BellSouth was unable to respond to the specific complaint. However, witness Stacy maintained that BellSouth's turnaround time for providing a CSR once a CLP has submitted a LOA is one day.

Witness Stacy conceded during cross-examination that MCIm has access to only a subset of the CSR information through LENS. The subset is not a complete CSR and excludes such things as a customer's credit history or pricing for the various services that the customer uses, except in Georgia. Witness Stacy also agreed that the pricing information was originally included, however, about a year ago, BellSouth removed that information because BellSouth believes that the information has value only as a marketing tool. Witness Stacy did concede, however, that the prices are tariffed rates. Witness Stacy also agreed that the Georgia Commission has ordered BellSouth to provide the pricing information and stated that BellSouth will comply with the Order but will only provide the information in Georgia. Witness Stacy read into the record a portion of the Georgia Order which reads, "BellSouth's testimony claiming marketing reasons for removing the rate information before passing it through to the CSRs was not credible". Concerning freezing CSRs, witness Stacy stated that BellSouth goes over a form with business customers which makes the customer aware of his option to freeze his CSR information if the customer wishes pursuant to a FCC Order (Docket 96-115 and 96-149). Witness Stacy also expressed that BellSouth believes that direct contact with the customer is required before a freeze can be lifted.

Witness Stacy agreed through cross-examination by the Public Staff that BellSouth does not provide CSR in electronic form to MCIm if the CSR exceeds the page limits discussed. However, witness Stacy acknowledged that BellSouth does have the CSR available in electronic form for BellSouth's own internal purposes.

On re-direct, witness Stacy stated that the Interconnection Agreement has a specific list of information to be included on a CSR and that BellSouth is providing every item on the list. He also stated that the list does not contain pricing information.

The Public Staff, in its Proposed Order, stated that it agrees with the Georgia Commission that, "BellSouth's claim that the rate information becomes proprietary when included in the CSR was not adequately supported, and was undermined by the facts that BellSouth had previously provided such information in fax format and that the basic rate information is not proprietary, and was generally not credible. In addition, Competitive Local Exchange Carriers (CLECs) cannot randomly browse through the CSRs to locate potential customers because they must obtain explicit customer approval before viewing the CSR." Although the Public Staff recognized that the Georgia Commission's Order dealt with OSS generally rather than under the terms of an interconnection agreement and that the Interconnection Agreement negotiated and arbitrated in North Carolina lists the information that is to be provided in the CSRs, the Public Staff believes that as a matter of parity MCIm should have access to all of the information on the CSR that is available to BellSouth, including pricing information, unless disclosure is prohibited by the customer. The Public Staff stated that it does not find anything in the Interconnection Agreement which would authorize BellSouth to redact CSRs before providing them to MCIm. The Public Staff also recommended that the Commission find that it is not appropriate to interfere with BellSouth's practice of requiring direct customer contact before releasing CSRs

that have been frozen by a customer, as the Public Staff believes that this practice is consistent with FCC regulations and with BellSouth's other practices regarding CPNI. Finally, the Public Staff believes that once a CSR is released, it should be provided to MCIm in substantially the same time and manner as it is to BellSouth's retail operations which would mean electronically, regardless of length and without redaction. The Public Staff also believes that parity requires that MCIm should be able to parse the data and populate an order from it using EDI and that to the extent that BellSouth has not made this ability available to MCIm, it should be required to do so.

The Commission notes that BellSouth is providing every item identified in the Interconnection Agreement that BellSouth is obligated to include in a CSR. Additionally, the Commission believes that due to the current vulnerability of telephone customers to things such as slamming, it is appropriate to allow BellSouth to maintain its current freeze procedures for CSRs. MCIm will be provided access to CSRs after the appropriate actions are taken by MCIm to remove the freeze placed on the CSR at the request of the customer. Finally, the Commission also believes that it is appropriate to require BellSouth, to the extent that it has not done so already, to make the CSR data available to MCIm so that MCIm can populate an order from the data using EDI.

CONCLUSIONS

The Commission concludes that it is appropriate to require BellSouth to provide only the specific items identified in the Interconnection Agreement on a CSR. Additionally, the Commission concludes that it is appropriate to allow BellSouth to maintain its current freeze procedures for CSRs. Finally, the Commission concludes that it is appropriate for BellSouth, to the extent that it has not done so already, to make the CSR

data available to MCIm so that MCIm can populate an order from the data using EDI.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

Issue: Has BellSouth provided MCImetro with service jeopardy notification in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has failed to provide MCImetro with electronic notification for all service jeopardies. BellSouth should be ordered to provide MCImetro with commercially functional EDI support for service jeopardy notification within 30 days of the issuance of the Commission Order.

BELLSOUTH: Yes. BellSouth provides CLPs with service jeopardy notification in substantially the same time and manner as itself. BellSouth is willing to implement electronic notification of service jeopardies via EDI; however, such notification should be implemented through the Electronic Interface Change Control (EICC) process.

PUBLIC STAFF: No. BellSouth should provide MCImetro with electronic notification of service jeopardies via EDI.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsection 2.2.9.1 of the Interconnection Agreement which reads as follows:

> Subsection 2.2.9.1: "BellSouth shall provide to MCIm notification of any jeopardy situations prior to the Committed Due Date, missed appointments and any other delay or problem in completing work

specified on MCIm's service order as detailed on the Firm Order Confirmation (FOC)."

There are two specific types of jeopardies:

(1) Missed appointment (or customer caused or end-user caused) jeopardies which are situations where service is not installed because the customer is unavailable at the scheduled time; and

(2) Service (or company-caused or facilities) jeopardies are situations in which BellSouth is unable to complete the installation on time due to such factors as workload or unavailability of facilities.

MCIm witness Turner stated that BellSouth has agreed to provide missed appointment jeopardies via EDI, although MCIm has not tested that notification process. However, for service jeopardies, witness Turner stated that BellSouth calls MCIm, which in turn has to call its customers. Witness Turner maintained that it is critical for MCIm to receive notice of service jeopardies so it can notify its customers immediately and track the status of its orders accurately. Witness Turner stated that the notification process faced by MCIm contains an extra manual step that BellSouth does not incur, and, therefore, MCIm cannot relay jeopardy notifications to its customers as rapidly and efficiently as BellSouth. MCIm has requested electronic notification of service jeopardies via EDI, but to date, BellSouth has not been willing to grant MCIm's request. MCIm is asking for the Commission to require BellSouth to provide commercially functional EDI support for its service jeopardy notifications.

Witness Turner state in rebuttal testimony that MCIm faces an additional manual step in its service jeopardy notification process. Witness Turner argued that BellSouth should be required to provide service jeopardies via EDI as requested by MCIm without submitting a Bona Fide Request (BFR). Further, witness Turner argued that MCIm should not be required to use

the EICC process to obtain service jeopardy notifications via EDI because nothing in the EICC process permits BellSouth to avoid its preexisting contractual obligations. Witness Turner concluded that since BellSouth did not submit a change request for jeopardies for the July 13, 1998 change management sessions, BellSouth must agree with MCIm.

BellSouth witness Stacy stated in prefiled testimony that CLPs are notified by the Local Carrier Services Center (LCSC) by facsimile or via the LENS interfaces; however, MCIm currently does not use either electronic interface for ordering. Therefore, witness Stacy maintained, in this situation, the BellSouth work management center will call the CLP. However, witness Stacy stated that BellSouth is willing to implement electronic notification of service jeopardies via EDI before industry standards are established, but that it would not be a unilateral effort by BellSouth. A CLP would have to submit a BFR as defined in its interconnection agreement with BellSouth to pursue this type of enhancement. Witness Stacy also offered that the EICC process went into effect on May 15, 1998 and defines how BellSouth and CLPs will manage requested changes and enhancements to the CLP electronic interfaces. Witness Stacy stated that the Committee has proposed adding electronic notification of service jeopardies to EDI which is currently dependent on the EICC process.

Witness Stacy agreed during cross-examination that for missed appointment jeopardies, MCIm will receive electronic notification via EDI, however, for other service jeopardies, MCIm will receive notification by telephone or by fax. Witness Stacy also agreed that there is an additional step for a CLP to learn of a jeopardy.

The Public Staff, in its Proposed Order, maintained that the Interconnection Agreement does require BellSouth to give electronic notification of service jeopardies just as it does missed appointment jeopardies. The Public Staff stated that there is no distinction in either Attachment VIII, Subsection 2.2.9.1, or in the

chart following that attachment between service jeopardies and missed appointment jeopardies. The Public Staff also stated that it does not believe that the fact that the matter has been referred to the EICC Committee relieves BellSouth of its obligations under the Interconnection Agreement. The Public Staff recommended that the Commission find that BellSouth should provide MCIm with service jeopardy notification via EDI no later than December 31, 1998.

The Commission notes that the language in the Interconnection Agreement does not distinguish between service jeopardies and missed appointment jeopardies, and only references "any jeopardy situation". Additionally, the Commission notes that the Interconnection Agreement requires BellSouth to provide notification to MCIm of any jeopardy situation, however, it does not specify *electronic* notification. Therefore, the Commission does not believe that BellSouth is obligated under the Interconnection Agreement to provide electronic notification of service jeopardies as requested by MCIm.

CONCLUSIONS

The Commission concludes that BellSouth is not required under the terms of the Interconnection Agreement to provide MCIm service jeopardy notification via EDI.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

Issue: Has BellSouth provided MCImetro with information about BellSouth's OSS and related databases in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has failed to provide MCImetro with the information about BellSouth's internal OSS and related databases that is needed to judge whether the OSS provided to MCImetro is at parity with that used by BellSouth. BellSouth should be required to provide the requested information within 10 days from the date of the Commission's final Order.

BELLSOUTH: Yes. BellSouth has supplied the necessary information relevant to its OSS to all CLPs, including MCImetro, via their account teams, at CLP conferences, during training classes, OSS meetings, and workshops. Access to most of this information is also available at BellSouth's Interconnection Web Site. MCImetro is not entitled to proprietary information contained in BellSouth's OSS. MCImetro can be assured of nondiscriminatory access to BellSouth's OSS through performance measures found acceptable by the North Carolina Utilities Commission.

PUBLIC STAFF: Yes. BellSouth should not be required to systematically disclose details of its internal OSS to MCImetro.

DISCUSSION

BellSouth witness Hendrix referenced Part A, Sections 13.3 and 13.8 of the Interconnection Agreement which state:

> Section 13.3: "BellSouth agrees that it will provide to MCIm on a nondiscriminatory basis . . . the operations support systems as set forth in this Agreement. BellSouth further agrees that these services, or their functional components, will contain all the same features, functions and capabilities and be provided at a level of quality at least equal to the level which it provides to itself or its Affiliates."

> Section 13.8: "BellSouth agrees that order entry, provisioning, installation, trouble resolution, maintenance, billing, and service quality with respect to Local Resale will be provided at least as expeditiously as BellSouth provides for itself or for its own retail local service or to others, or to its Affiliates, and that it will provide such services to MCIm in a competitively neutral fashion."

Witness Hendrix also referenced Attachment VIII, Section 2.3.1.3 and Section 5.1.1.1 which state:

> Section 2.3.1.3: "BellSouth and MCIm shall agree on and implement interim solutions for each interface within thirty (30) days after the Effective Date of this Agreement, unless otherwise specified in Exhibit A of this Attachment. The interim interface(s) shall, at a minimum, provide MCIm the same functionality and level of service as is currently provided by the electronic interfaces used by BellSouth for its own systems, users, or subscribers."

> Section 5.1.1.1: ". . . BellSouth shall provide necessary maintenance business process support as well as those technical and systems interfaces required to enable MCIm to provide at least the same level and quality of service."

The direct and rebuttal testimony of MCIm witness Martinez and the cross-examination and deposition of witness Martinez from the Florida MCIm/BellSouth complaint proceeding were stipulated into the record in this proceeding. Witness Martinez testified that MCIm is entitled to receive OSS at parity and further stated that MCIm is entitled to know what BellSouth's capabilities are so that it may obtain these capabilities for itself.

In rebuttal testimony, witness Martinez stated that the Act and the Interconnection Agreement require that BellSouth provide parity in the OSS offered to MCIm, but that they do not specify how it is to be achieved.

Witness Martinez also asserted that parity cannot be achieved unless BellSouth is required to disclose its systems and databases so that MCIm can determine the OSS to which it is entitled. However, witness Martinez further testified that MCIm does not seek to acquire BellSouth's intellectual property and would agree to appropriate restrictions on MCIm's use of the information provided.

During cross-examination before the Florida Commission, which was stipulated into the record in this instant proceeding as if given orally from the witness stand in North Carolina, witness Martinez conceded that, at the time the Florida agreement was negotiated, MCIm did not envision receiving information about all of BellSouth's OSS. However, witness Martinez stated that MCIm's position that it needed access to BellSouth's OSS developed only after the contract was executed. Witness Martinez argued that the contract foresaw accessing BellSouth's OSS because so much time was spent talking about electronic interfaces, and that MCIm must have access to the information in order to understand if it is receiving the parity that is so pervasive throughout the contract.

According to MCIm witness Turner, since BellSouth has refused to provide MCIm information concerning BellSouth's systems and databases, it is preventing MCIm from learning all of the capabilities MCIm should expect BellSouth to afford it. Witness Turner testified in direct testimony that MCIm requested the information from BellSouth in its December 24, 1997 letter to BellSouth to which BellSouth responded by letter dated February 11, 1998, refusing to provide the requested information. According to witness Turner, MCIm is requesting that the Commission require BellSouth to permit MCIm to review (i) a detailed listing of all OSS systems that BellSouth uses; (ii) all technical specifications for each of the listed systems, including but not limited to information explaining what functions the system performs, how the system performs

those functions, what databases and other systems it interacts with and whether an interface can be built into the system; (iii) a detailed listing of each of the databases that are used by BellSouth's OSS systems; and (iv) a description of each of the listed databases, including but not limited to a database layout specifically identifying the characteristics of all database fields.

In his rebuttal testimony, witness Turner stated that the materials and training that BellSouth witness Stacy testified had been provided to CLPs does not address MCIm's concerns on OSS since the information relates to the OSS BellSouth provides to MCIm, and not BellSouth's own internal OSS. Witness Turner further stated that BellSouth witness Stacy's contention that MCIm has been given opportunities to learn about BellSouth's OSS has only been in the context of Section 271 hearings and related workshops, but such examination as a practical matter has been limited. Witness Turner concluded that it is suspicious that BellSouth is willing to produce certain information about its OSS, but is not willing to produce even a simple list of the OSS systems and databases that it uses.

Witness Turner testified during cross-examination that it is MCIm's position that it must be able to view all of BellSouth's OSS in order to determine if MCIm is actually being provided OSS at parity with the OSS BellSouth provides to itself. Witness Turner further stated that if BellSouth could show that a system had nothing to do with either pre-ordering, ordering, provisioning, maintenance and repair, or billing, then MCIm would not want to see those OSS systems. Witness Turner also testified that he did not believe that any Commission anywhere, any state, or the FCC has ordered the type and scope of access to any Local Exchange Carrier's (LEC's) OSS systems as MCIm is requesting in this proceeding.

BellSouth witness Stacy maintained in prefiled testimony that MCIm has been provided the "necessary

information" relevant to BellSouth's OSS through account teams, CLP conferences, and during training classes, OSS meetings and workshops. Further, CLPs have access to this information via BellSouth's web site. Witness Stacy argued that MCIm's request to review BellSouth's internal or back-office OSS systems is unreasonable since back office OSS are proprietary intellectual property because they contain software which is trade secret information. Witness Stacy maintained that there are no provisions in TA96, the Interconnection Agreement, or any Statute which requires BellSouth to comply with MCIm's request in this regard. Witness Stacy offered that instead of examining BellSouth's internal OSS systems, MCIm may receive a yearly audit of BellSouth's performance measurements by an independent, third party auditor, which BellSouth will pay for. Concerning witness Turner's complaint that LENS is deficient because it is not a machine-to-machine interface and that BellSouth has no machine-to-machine, pre-ordering interface, witness Stacy maintained that LENS has a machine-to-machine version called CGI and BellSouth offers another machine-to-machine; pre-ordering interface called EC-Lite. Witness Stacy also maintained that CGI is a true machine-to-machine, pre-ordering interface, and BellSouth has proven that with a third-party software vendor, Albion International, Inc.

BellSouth witness Stacy testified on cross-examination that BellSouth's position is that the various state commissions have the right and authority to understand any of the OSS they choose to investigate; however, MCIm does not have the right to information on BellSouth's internal OSS. Finally, witness Stacy agreed that CLPs have not learned everything there is to know about the capabilities of BellSouth's OSS.

The Public Staff, in its Proposed Order, stated that it appreciates the difficulty faced by MCIm and the other CLPs in assuring themselves that they are being

provided OSS at parity with BellSouth. The Public Staff maintained that evidence presented in this and other recent proceedings indicates that more remains to be done by BellSouth, the CLPs, and the industry as a whole to achieve this level of confidence and even then the CLPs are not likely to be fully satisfied. The Public Staff stated that it does not believe that the systematic disclosure of BellSouth's systems and databases requested by MCIm is required by the Interconnection Agreement or the Act. The Public Staff also stated that it expects the enhanced performance measurements, which BellSouth has recently developed and submitted in Docket No. P-55, Sub 1022, will provide valuable information on OSS. The Public Staff concluded that it would recommend that to the extent that the information provided in Docket No. P-55, Sub 1022 is lacking or indicates the need for further investigation, the Commission should conduct its own inquiries with appropriate safeguards.

MCIm is arguing that without knowing the internal OSS that BellSouth has available to itself, MCIm has no way of knowing if the OSS BellSouth provides to MCIm is at parity with the OSS BellSouth uses. However, the Commission agrees with the Public Staff in this regard that there are alternative ways to determine OSS parity other than to allow MCIm access and information on all of BellSouth's internal OSS. The Commission recognizes that performance measurements have been filed in Docket No. P-55, Sub 1022 which will be analyzed by the Commission. The Commission believes that it is appropriate in this regard for the Commission to further investigate any concerns over OSS parity after the performance measurements have been reviewed and analyzed, if such concern exists. Therefore, the Commission finds that allowing MCIm access to all of BellSouth's internal OSS is not required under the Interconnection Agreement or the Act.

CONCLUSIONS

The Commission concludes that under the Interconnection Agreement or the Act, BellSouth is not required to systematically disclose information of its internal OSS to MCIm. The Commission further concludes that to the extent that the information provided in Docket No. P-55, Sub 1022 is lacking or indicates the need for further investigation of BellSouth's OSS, the Commission will conduct its own inquiries with appropriate safeguards.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

Issue: Has BellSouth provided MCImetro with network blockage measurements in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has provided MCImetro with only limited network blockage information. BellSouth should be ordered to provide the detailed network blockage information requested by MCImetro in its December 24, 1997 letter to BellSouth within 30 days of the issuance of the Commission Order.

BELLSOUTH: Yes. The Interconnection Agreement does not require BellSouth to produce the blocking measurements requested by MCImetro. BellSouth measures MCImetro trunk blockage in the same manner as it measures BellSouth's trunk blockage.

PUBLIC STAFF: No. BellSouth should provide MCImetro with all blockage data that is available to BellSouth on trunks that serve MCImetro.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Part A, Subsection 13.2 of the Interconnection Agreement which reads as follows:

> "BellSouth agrees that Interconnection will be provided in a competitively neutral fashion, at any technically feasible point within its network as stated in this Agreement and that such interconnection will contain all the same features, functions and capabilities, and be at least equal in quality to the level produced by BellSouth to itself or its Affiliates."

BellSouth witness Hendrix referenced Attachment IV, Sections 4.2.1 and 4.2.2 of the Interconnection Agreement which state:

> Section 4.2.1: "A blocking standard of one percent (.01) during the average busy hour, as defined by each party's standards, for final trunk groups between a MCIm end office and a BellSouth access tandem carrying meet point traffic shall be maintained. All other final trunk groups are to be engineered with a blocking standard of one percent (.01). Direct end office trunk groups are to be engineered with a blocking standard of one percent (.01). The blocking standard of one half of one percent (.005) will be used on trunk groups carrying interLATA traffic."
>
> Section 4.2.2: "For trunks carrying MCIm interLATA traffic, MCIm may request BellSouth to report trunk group service performance and blocking standards to the industry."

MCIm witness Martinez argued that to comply with the provisions of the Interconnection Agreement, BellSouth must provide adequate network blockage data to allow MCIm to determine whether parity is being provided and to allow MCIm to properly engineer its

network. Witness Martinez testified that in a letter dated December 24, 1997, MCIm requested BellSouth to provide the following information for the most recent three month period: (i) blockage data on all common trunk groups utilized for CLP traffic that experienced blockage; (ii) blockage data on all of MCIm's interconnection trunk groups from BellSouth's end offices and tandems to MCIm's points of termination that experienced blockage; (iii) blockage data on all CLP interconnection trunk groups from BellSouth's end offices and tandems to CLP points of termination that experienced blockage; and (iv) similar blockage data on all trunks carrying BellSouth local traffic. Further, MCIm requested that BellSouth provide the same information on a month-to-month basis going forward. According to witness Martinez, the only reports provided on blockage data, which include the CLEC Trunk Group Service Report, the BellSouth Common Transport Trunk Groups (CTTG) Blocking Report, the Local Network Trunk Group Service Report, and the BellSouth Local Network Blocking Report, fall far short of providing the information that was requested by MCIm and that is needed to gauge trunk group blockage.

In his rebuttal testimony, witness Martinez stated that BellSouth provides CLPs with blockage information for trunk groups that experience certain levels of blockage (2% or 3% blockage during the "time consistent busy hour"), whereas BellSouth has information showing blockage below these maximum levels. Thus, witness Martinez argued that while CLPs are only given information showing where emergencies already exist, BellSouth has information that enables it to prevent the emergencies from occurring in the first place. CLPs must rely on this information from BellSouth because CLPs' switches do not indicate that traffic from BellSouth's network in not getting through. MCIm believes that BellSouth's practice of refusing to provide critical blockage information in its possession constitutes the failure to provide parity under the Act

and the Interconnection Agreement. MCIm is requesting that BellSouth be required to provide the information that was requested in its December 24, 1997 letter within 30 days of the issuance of the Commission Order.

BellSouth witness Stacy maintained in prefiled testimony that BellSouth produces three reports: Comparative Trunk Group Service Summary, Trunk Group Service Report, and Trunk Group Service Detail. Blocking thresholds for all trunk groups are 3%, except BellSouth Telecommunications Corporation (BST) CTTG, which is 2%, according to witness Stacy. Witness Stacy also maintained that the reports have been produced for CLPs in the aggregate by BellSouth since January 1998 and have been posted on the BellSouth web site since February 1998 (CLP specific blocking reports have been posted since July 1998). Further, witness Stacy stated MCIm specific trunk blocking reports were produced for March and will be produced on a monthly basis in the future. Witness Stacy believes that the reports produced by BellSouth should satisfy all of MCIm's trunk blocking requests.

BellSouth witness Stacy testified on cross-examination that BellSouth is providing exception reports which are exactly the same reports that BellSouth uses for itself. Witness Stacy further agreed that BellSouth has access to all of the blockage data it chooses to see, but as "a matter of fact, BellSouth doesn't use the data." Witness Stacy also stated that the threshold determined by the industry over a long period of time is 3%. Therefore, witness Stacy argued, it is appropriate to ignore the blockage every month unless it is over 3% since the network was designed to experience 3% or less blockage in any given month. Witness Stacy clarified that there are two groups: one you design for 1% blockage, and your exception report starts at 3% and one you design for 1/2% blockage, and your exception report starts at 2%. Witness Stacy acknowledged that the Interconnection Agreement

references a design standard for blocking of 1% for same circuits and 1/2% for other circuits, however, he stated that the Interconnection Agreement is silent on how the traffic data is to be exchanged between the two parties.

The Public Staff, in its Proposed Order, stated that it can think of no legitimate reason for BellSouth to withhold from MCIm blockage data, which it admittedly has, on trunks that serve MCIm. The Public Staff recommended that the Commission find that BellSouth should be required to provide MCIm with monthly reports which identify blocking percentages on all local trunk groups between MCIm and BellSouth that experience blockage. The Public Staff also recommended that the Commission require that the initial report include detail for the three preceding months and should be provided within 30 days from the date of the Commission Order in this docket.

The Commission believes that BellSouth should make available to MCIm the same blockage data that BellSouth uses for itself. The Commission also believes that it is appropriate to require BellSouth to make the initial information available within 30 days of the issuance of this Order.

CONCLUSIONS

The Commission concludes that BellSouth should make available to MCIm the same blockage data that BellSouth uses for itself. The Commission also believes that it is appropriate to require BellSouth to make the initial information available within 30 days of the issuance of this Order.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

Issue: Has BellSouth provided MCImetro with local tandem interconnection information in compliance with

the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: Yes. Initially, BellSouth did not. BellSouth has provided information since the complaint was filed that may enable it to interconnect at BellSouth's local tandems. Accordingly, no further action by the Commission is requested at this time.

BELLSOUTH: Yes. This issue has been resolved and no longer needs further action by the Commission. BellSouth has provided MCImetro with the requested information on local tandem interconnection.

PUBLIC STAFF: Yes. BellSouth is providing MCImetro with the information necessary for local tandem interconnection.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Part A, Subsection 13.2 of the Interconnection Agreement which reads as follows:

> "BellSouth agrees that Interconnection will be provided in a competitively neutral fashion, at any technically feasible point within its network as stated in this Agreement and that such interconnection will contain all the same features, functions and capabilities, and be at least equal in quality to the level produced by BellSouth to itself or its Affiliates."

BellSouth witness Hendrix stated in prefiled testimony that the Interconnection Agreement does not specifically address local tandem interconnection information. However, witness Hendrix stated that the Interconnection Agreement states:

> "MCIm shall designate at least one IP (Interconnection Point) in the LATA in which MCIm

originates local traffic and interconnects with BellSouth. Upon MCIm's request for additional points of interconnection, BellSouth will interconnect with MCIm at any Technically Feasible point on BellSouth's network of MCIm's choosing using the same technical configuration or using other arrangements, including but not limited to mutually agreed upon mid-span fiber meets, entrance facilities, telco closets, and physical or virtual collocation."

According to MCIm witness Martinez in his direct testimony, local tandems are tandems in BellSouth's network that interconnect end offices but do not provide access for long-distance traffic.

In his rebuttal testimony, witness Martinez confirmed that MCIm now is attempting to interconnect at BellSouth's local tandems based on the information BellSouth has provided. Witness Martinez stated that no further Commission action is requested at this time.

BellSouth witness Milner stated in prefiled testimony that BellSouth has informed MCI of the availability of local tandem interconnection and has provided information regarding how such interconnection can be ordered.

During his summary at the hearing, witness Milner confirmed that based on his understanding of MCIm witness Martinez's rebuttal testimony, witness Milner believes that the issue has been resolved and no further action is required on the part of the Commission.

The Public Staff, in its Proposed Order, recommended that the Commission find that this count of the complaint has been satisfied. However, the Public Staff also recommended that the Commission monitor the situation by requiring BellSouth and MCIm to submit quarterly reports on the status of MCIm's interconnection at BellSouth's local tandems for the next year.

The Commission believes based on the record of evidence that this issue has been resolved and no further action is required on the part of the Commission.

CONCLUSIONS

The Commission concludes that BellSouth has provided the information requested since the complaint was filed that may enable MCIm to interconnect at BellSouth's local tandems. Accordingly, no further action by the Commission is necessary at this time.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

Issue: Has BellSouth provided MCImetro with access to directory listing information in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth has failed to provide MCImetro with directory listing information for certain customers of other local telephone companies. BellSouth should be ordered to provide MCImetro with such information within 10 days from the issuance of the Commission Order.

BELLSOUTH: Yes. BellSouth believes it would be most appropriate to make all directory listings available, but its contractual commitments preclude it from doing so. Decisions by third party companies with regard to the use of their listing information should not be construed as a breach by BellSouth of its Interconnection Agreement with MCImetro. MCImetro should be ordered to negotiate with companies over the release of their listings.

PUBLIC STAFF: Yes. BellSouth is not required to provide MCImetro with directory listing information for

customers of ILECS and CLPs who have contracts with BellSouth prohibiting disclosure of such information.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment VIII, Subsection 6.1.6.1 of the Interconnection Agreement which reads as follows:

> "BellSouth shall provide to MCIm, to the extent authorized, the residential, business and government subscriber records used by BellSouth to create and maintain its Directory Assistance Database, in a non-discriminatory manner. MCIm may combine the Directory Assistance Database with any other Network Element for the provision of any Telecommunications Service."

BellSouth witness Hendrix also referenced Attachment VIII, Subsection 6.1.6.1.

MCIm witness Martinez argued in his rebuttal testimony that the Act requires all ILECS to provide nondiscriminatory access to directory listings and that this duty supersedes any contractual restriction in BellSouth's agreements with other telephone companies.

BellSouth witness Milner stated in prefiled testimony that the issue relates to two services offered by BellSouth: (1) Directory Assistance Database Services (DADS) and, (2) Direct Access to Directory Assistance Services (DADAS). Witness Milner stated that DADS can be thought of as a "snapshot" of the database at any given point in time while DADAS is a data link to BellSouth's on-line directory assistance database containing customer directory assistance listings. Witness Milner further clarified that BellSouth does not provide CLPs' listings of some local service providers through DADS or DADAS with which BellSouth has a contract precluding BellSouth from providing the listings. Witness Milner stated that BellSouth must honor its contractual obligations which preclude the Company

from offering all listings to CLPs. Witness Milner also stated that BellSouth has gone to considerable efforts to seek permission from the local service providers to amend its interconnection agreements with those local service providers which prohibits release of their listing information to third parties. Witness Milner stated that in May 1998, BellSouth wrote to or specifically contacted the independent telephone companies in North Carolina for which BellSouth provides directory assistance services in their interconnection agreements which prevent BellSouth from including their listings in the DADS or DADAS databases. The following companies have not agreed to alter the contracts: (1) Atlantic TMC; (2) GTE South; (3) Randolph Telephone Cooperative; and (4) ALLTEL of North Carolina. According to witness Milner, BellSouth also contacted the CLPs in North Carolina which had similar language in their interconnection agreements and at the time of witness Milner filing his testimony, the following CLPs have interconnection agreements with BellSouth which prevent the inclusion of their listings in BellSouth's DADS and DADAS services: (1) ALLTEL of North Carolina; (2) AT&T; and (3) Sprint. Therefore, according to witness Milner, under contractual obligations, BellSouth cannot provide all directory assistance listings to MCIm and BellSouth has fulfilled its contractual commitments to MCIm under the Interconnection Agreement.

Witness Milner stated in his summary at the hearing that it is important to note that MCIm is free to negotiate directly with the four independent companies and three CLPs for their listings.

During the hearing, witness Milner was referenced to sections of the AT&T and BellSouth Interconnection Agreement. Witness Milner read part of the agreement which states, "BellSouth shall refer any requests from third parties for AT&T's subscriber list information to AT&T." Witness Milner stated that BellSouth interpreted that to mean that BellSouth should not act on a

request, but simply refer the request to AT&T. Witness Milner also expressed that it is his understanding that the agreement references third parties to mean companies and not customers; however, he did acknowledge that the agreement does not expressly state that. Witness Milner also agreed that it is BellSouth's preference to provide the complete database to CLPs such as MCIm. Finally, witness Milner stated that if the Commission ordered BellSouth to provide the complete database, BellSouth would comply with the Commission Order.

Witness Milner testified that he did not know for sure whether MCIm has contacted AT&T and asked for the directory listings.

The Public Staff, in its Proposed Order, stated that it is of the opinion that BellSouth has done all that it is required to do, if not more, to comply with the requirements of TA96 and the Interconnection Agreement with regard to its directory assistance database. The Public Staff stated that it believes that the matter is between MCIm and the other ILECS and CLPs rather than between MCIm and BellSouth. The Public Staff maintained that the resulting impact on local competition of some CLPs and ILECS still refusing to provide their listings despite attempts by BellSouth and MCIm to persuade them to do so is unacceptable. The Public Staff recommended that the Commission find that it is appropriate for the Commission to express that it is prepared to take appropriate action, if necessary, to ensure the availability of complete directory assistance databases to all local providers.

The Commission believes that it is important in a competitive local service environment for all carriers to have access to complete directory assistance databases. However, based on the record of evidence presented in this docket, the Commission believes that BellSouth has fulfilled its obligation under the Interconnection Agreement and the Act concerning access to complete directory assistance databases. The Commission is not

inclined to interfere in the interconnection agreements between BellSouth and the CLPs and other ILECS that refuse to provide their listings for inclusion in BellSouth's databases.

CONCLUSIONS

The Commission concludes that BellSouth has provided MCImetro with access to directory listing information in compliance with the Act and the Interconnection Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

Issue: Under the Interconnection Agreement, are MCImetro and BellSouth required to compensate each other for transport and termination of traffic to ISPs? If so, what action should be taken.

POSITIONS OF PARTIES

MCIMETRO: Yes. BellSouth and MCImetro must pay each other reciprocal compensation for the termination of telephone calls to ISPs. The definition of Local Traffic makes no exception for such calls. Had such an exception been intended, it would have been expressly included by the parties. BellSouth should be ordered to pay reciprocal compensation for such traffic.

BELLSOUTH: No. BellSouth has remitted payment for local traffic as defined in the Interconnection Agreement. BellSouth disagrees that ISP traffic is local traffic which by definition in the agreement would originate and terminate within the same exchange or an extended area service (EAS) exchange. A ruling on this count should be withheld until the FCC resolves the jurisdictional and compensation issues regarding ISP traffic currently pending before the FCC.

PUBLIC STAFF: Yes. BellSouth should pay MCImetro reciprocal compensation on traffic terminated to ISPs, going forward and all amounts past due, plus interest.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment IV, Subsection 2.2.1 of the Interconnection Agreement which reads as follows:

> "The Parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the North Carolina Utilities Commission. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff."

BellSouth witness Hendrix also referenced Attachment IV, Subsection 2.2.1. Witness Hendrix stated that BellSouth "totally disagrees" that ISP traffic is local. He argued that calls made to the Internet through ISPs that originate on one CLP or ILEC's network do not "terminate" on the other CLP or ILEC's network since a single Internet call can communicate with international, interstate, and local destinations simultaneously. Therefore, witness Hendrix concluded the ISP traffic cannot be considered "local" and, hence, is not subject to reciprocal compensation. Witness Hendrix recommended that the Commission withhold ruling on this issue until the FCC resolves the jurisdictional and compensation issues regarding ISP traffic currently pending before it.

The Public Staff, in its Proposed Order, stated that the Commission's ruling in Docket No. P-55, Sub 1027 supports MCIm's claim that it is entitled under the

Interconnection Agreement to reciprocal compensation on traffic terminated to ISPs. The Public Staff noted that in that case, the Commission rejected BellSouth's position that such traffic is not local traffic as defined in its Interconnection Agreement with US LEC. The Public Staff further stated that no new facts or arguments were presented in this case which should cause the Commission to change its previous decision on this issue. Therefore, the Public Staff recommended that the Commission find that BellSouth should be required to pay MCIm reciprocal compensation on traffic terminated to ISPs, going forward and all amounts past due, plus interest.

The Commission also notes that it has previously ruled on this issue in Docket No. P-55, Sub 1027 (Interconnection Agreement of BellSouth and US LEC). By Order dated February 26, 1998, the Commission found that ISP traffic is local and subject to reciprocal compensation. BellSouth appealed the Order in District Court and asked the District Court to refer the issue to the Federal level since in BellSouth's opinion it is interstate traffic. Additionally, by Order dated November 4, 1998 issued in Docket No. P-55, Sub 1096 (Interconnection Agreement between BellSouth and Intermedia Communications, Inc.) the Commission affirmed its previous decision on this issue (i.e., finding the traffic local and applicable to reciprocal compensation). The Commission agrees with the Public Staff that no new evidence was presented in this case. Therefore, the Commission finds that BellSouth is required to pay MCIm reciprocal compensation on traffic terminated to ISPs, going forward and all amounts past due, plus interest.

CONCLUSIONS

The Commission concludes that BellSouth should pay MCIm reciprocal compensation on traffic terminated to ISPs, going forward and all amounts past due, plus interest under the Interconnection Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

Issue: Has BellSouth provided MCImetro with soft dial tone service in compliance with the Act and the Interconnection Agreement? If no, what action, if any, should the Commission take?

POSITIONS OF PARTIES

MCIMETRO: No. BellSouth provides soft dial tone in a discriminatory fashion that identifies only BellSouth as the carrier to be contacted for installation of local service. BellSouth should be required to change this to an unbranded notification message within 30 days from the issuance of the Commission Order.

BELLSOUTH: Yes. BellSouth's QuickService announcement advises customers to use another line to reach BellSouth or any other provider and it is competitively neutral. BellSouth should be allowed an opportunity to market its services provided via its own facilities. Once the CLP disconnects its subscriber from the line, the cost of maintaining the line becomes completely the responsibility of BellSouth and, therefore, it is only reasonable that BellSouth retain the opportunity to mention the availability of its service.

PUBLIC STAFF: No. BellSouth should change its soft dial tone message to make it competitively neutral.

DISCUSSION

MCImetro is claiming that BellSouth has breached its contractual obligations under Attachment III, Subsection 7.2.1.11.4 of the Interconnection Agreement which reads as follows:

> "Soft dial tone where required by law. Where BellSouth provides soft dial tone, it shall do so on a competitively neutral basis."

BellSouth witness Hendrix also referenced Attachment III, Subsection 7.2.1.11.

Soft dial tone refers to a situation where a telephone line has been disconnected for any reason, however, a "soft" dial tone will still be available from the line to enable someone to only dial 911 emergency services.

BellSouth provides soft dial tone, as referenced in Attachment III, Subsection 7.2.1.11.4 of the Agreement and has the following message on the line:

> "You can only dial '911' from this line. To reach BellSouth or another Local Service Provider, you must call from another location."

MCIm believes that the soft dial tone message is not competitively neutral as required in the Interconnection Agreement. MCIm recommended that the Commission require BellSouth to provide a soft dial tone message as follows:

> "This telephone only may be used for emergency access to 911. To order service for this line, please call one of the local service providers in your area."

BellSouth argued that it incurs the cost of maintaining the telephone line after service has been discontinued, therefore, it is not unreasonable for BellSouth to mention its name in the soft dial tone message. According to BellSouth witness Milner, soft dial tone, or what BellSouth calls "QuickService" capability, is available to all CLPs who resell BellSouth's services. Witness Milner expressed that the nature of the dispute is that BellSouth references itself by name in the soft dial tone message, which MCIm claims is not "competitively neutral". Witness Milner argued that BellSouth's message is competitively neutral for three reasons. First, witness Milner argued that recently, the FCC noted that on inbound telemarketing calls, a Bell Operating Company (BOC) could recommend its own long distance affiliate so long as it also states that other carriers also provide long distance services. Witness Miler implied that this situation is similar and in this case, BellSouth also mentions that other service providers are available. Second, witness Milner stated

that after a CLP disconnects its subscriber from a line, the CLP no longer bears any of the cost for maintaining the line, BellSouth does. Therefore, witness Milner argued, it is only reasonable that BellSouth retain the opportunity to mention the availability of its service. Finally, witness Milner stated that the Commission has designated BellSouth as the carrier of last resort in its franchised area. The designation obligates BellSouth to serve any requesting end user customer. Witness Milner stated that by not mentioning BellSouth in the soft dial tone message, customers would be confused. He maintained that the language referencing BellSouth is consistent with BellSouth's designation as carrier of last resort.

During cross-examination, witness Milner agreed that the Interconnection Agreement does not state that if a carrier is the carrier of last resort, then the competitively neutral standard is waived. Witness Milner also denied that the message is an advertisement or that it is used by BellSouth to gain a competitive advantage. Finally, witness Milner also testified that in North Carolina, soft dial tone is required by Commission Rule and that any benefit (i.e. cost savings) to BellSouth in providing soft dial tone would be of an operational nature.

The Public Staff, in its Proposed Order, stated that it agrees with MCIm that BellSouth's soft dial tone message is not competitively neutral as required under the Interconnection Agreement. The Public Staff stated that it understands BellSouth's desire to identify itself on a line it maintains; however, the Public Staff believes that the fact remains that BellSouth agreed to a contractual provision which cannot be construed to permit such branding of facilities or services. The Public Staff recommended that the Commission require BellSouth to revise its soft dial tone message to reflect the following statement:

> "You may only dial 911 from this line. To establish telephone service, you must call from another location."

The Public Staff further recommended that the above message be put on all lines equipped with soft dial tone within 30 days of the date of the Commission Order in this docket.

The Commission believes that the term "competitively neutral" precludes BellSouth from specifically identifying itself on the soft dial tone message without referencing other local service providers by name. The Commission further agrees that the soft dial tone message recommended by the Public Staff fulfills the requirements of the Interconnection Agreement for competitive neutrality. Further, the Commission finds that BellSouth should change its soft dial tone message within 30 days from the date of the Commission Order.

CONCLUSIONS

The Commission concludes that BellSouth should be required to alter its soft dial tone message within 30 days of the issuance of this Order to read as follows:

> "You may only dial 911 from this line. To establish telephone service, you must call from another location."

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and MCIm should negotiate the initial subset of the RSAG database that will be assembled and provided and the price to be paid by MCIm for this one-time service. The cost of extracting data which BellSouth believes should not be provided with the RSAG database is a cost that should be borne by BellSouth. BellSouth should be required to provide real-time access to updates to the database at no charge.

2. That BellSouth should provide MCIm with the ability to calculate due dates in the inquiry mode of LENS which BellSouth was planning to complete by November, 1998, as well as in the interfaces that are being developed for the future. Additionally, BellSouth should integrate the due date intervals and scheduling data to provide MCIm with the ability to display available due dates comparable to that available to BellSouth through RNS.

3. That BellSouth should provide a means for MCIm to reserve telephone numbers which MCIm can integrate into its ordering system and reserve the same number of telephone numbers per order as BellSouth. Further, BellSouth should not be required to integrate the NXX information which is available in the LERG into the ordering system which it provides to MCIm.

4. That BellSouth should provide USOC information including FIDs and state validity information on a real-time electronic basis within 45 days. Additionally, BellSouth should provide updates to the USOC information on a real-time basis.

5. That BellSouth should provide all CSR data specifically outlined in the Interconnection Agreement which does not include pricing data. Additionally, BellSouth may maintain its current freeze procedures for CSRs.

6. That BellSouth should not be required to provide service jeopardy notification via EDI under the Interconnection Agreement.

7. That BellSouth should not be required to systematically disclose the details of its internal OSS to MCIm under the Interconnection Agreement or the Act. To the extent that the information provided in Docket No. P-55, Sub 1022 is lacking or indicates the need for further investigation of BellSouth's OSS, the Commission will conduct its own inquiries with appropriate safeguards.

8. That BellSouth should make available to MCIm the same network blocking data that BellSouth produces for its own use.

9. That BellSouth has provided the information requested since the complaint was filed that may enable MCIm to interconnect at BellSouth's local tandems. Accordingly, no further action by the Commission is necessary at this time.

10. That BellSouth has fulfilled its obligations under the Interconnection Agreement and the Act concerning access to directory listing information.

11. That BellSouth is required to pay MCIm reciprocal compensation on traffic terminated to ISPs, going forward and all amounts past due, plus interest under the Interconnection Agreement.

12. That BellSouth should alter its soft dial tone message within 30 days of the issuance of this Order to read as follows:

> "You may only dial 911 from this line. To establish telephone service, you must call from another location."

13. That, except as provided in this Order, MCIm's complaint is otherwise denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of February, 1999.

NORTH CAROLINA UTILITIES COMMISSION

/s/ Cynthia S. Trinks

Cynthia S. Trinks, Deputy Clerk

Glossary of Acronyms
Docket No. P-55, Sub 1094

ATLAS	Application for Telephone Number Load Administration and Selection
BellSouth	BellSouth Telecommunications, Inc.
BFR	Bona Fide Request
BOC	Bell Operating Company
BST	BellSouth Telecommunications Corporation
CGI	Common Gateway Interface
CLEC	Competitive Local Exchange Carrier
CLP	Competing Local Provider
COFFI	Central Office Features File Interface
CPNI	Customer Proprietary Network Information
CSR	Customer Service Record
CTTG	Common Transport Trunk Groups
DADAS	Direct Access to Directory Assistance Services
DADS	Directory Assistance Database Services
DOE	Direct Order Entry
DSAP	Direct Order Entry Support Applications Program
EAS	Extended Area Service
EC	Electronic Communications

EDI	Electronic Data Interchange
EI	Electronic Interfaces
EICC	Electronic Interface Change Control
FCC	Federal Communications Commission
FID	Field Identifier
FOC	Firm Order Confirmation
ICREF	Interexchange Carrier Reference Validation
ILEC	Incumbent Local Exchange Carrier
IP	Interconnection Point
ISP	Internet Service Provider
LAN	Local Area Network
LCSC	Local Carrier Services Center
LEC	Local Exchange Carrier
LENS	Local Exchange Navigation System
LEO	Local Ordering Guide
LERG	Local Exchange Routing Guide
LOA	Letter of Authorization
MCIm or MCImtero	MCImetro Access Transmission Services, Inc.
NDM	Network Data Mover
OSS	Operations Support Systems
P/SIMS	Product/Services Inventory Management System
RNS	Regional Navigation System

RSAG	Regional Street Address Guide
SAG	Street Address Guide
SOER	Service Order Error Routine
TA96 or the Act	The Telecommunications Act of 1996
NE	Unbundled Network Element
USOC	Universal Service Order Code
WAN	Wide Area Network

APPENDIX B-2

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-55, Sub 1094
IN THE MATTER OF
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC,
Complainant
v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Respondent

[Filed Apr. 6, 1999]

BEFORE: Geneva S. Thigpen, Chief Clerk.

ORDER ON RECONSIDERATION

BY THE COMMISSION: On March 9, 1999, MCImetro Access Transmission Services, LLC (MCImetro) filed its Motion for Reconsideration requesting reconsideration of Finding of Fact No. 10 of the Commission's February 10, 1999 Order Ruling on Complaint Proceeding which states, "BellSouth has fulfilled its obligations under the Interconnection Agreement and the Act concerning access to directory listing information." MCImetro asserted in its Motion for Reconsideration that because the Federal Communications Commission's (FCC's) Louisiana II Order [In re: Second Application by BellSouth Corporation For Provision of In Region, InterLATA Services in Louisiana] clarifies the law concerning access to directory listings and calls for a different conclusion than was reached by the Commission, the Commission should reconsider its ruling on this issue. MCImetro stated that BellSouth has recently acknowledged that the Louisiana II decision

requires BellSouth to change its approach to directory assistance database listings access. MCImetro concluded that since even BellSouth concedes that its position on access to directory assistance database listings must change after the Louisiana II Order, the Commission should reconsider its decision on this issue.

On March 22, 1999, BellSouth filed its comments on MCImetro's Motion. BellSouth asserted in its comments that it does not object to the Commission revising Finding of Fact No. 10 to reflect that BellSouth has taken steps to release the requested directory assistance information as a result of the FCC's Louisiana II decision. Additionally, BellSouth stated that no further action is needed by the Commission at this time. BellSouth maintained that two months after the hearing in this docket, the FCC issued its Louisiana II decision which clarified the law concerning access to directory listings. After the Louisiana II decision, BellSouth has written to all affected competing local providers (CLPs) and incumbent local exchange carriers (ILECs) in North Carolina to inform them of the FCC's ruling on the directory assistance issue. BellSouth stated that to comply with the FCC's Louisiana II decision, BellSouth will make all directory listings available by no later than May 1, 1999, regardless of their source. BellSouth has informed the affected CLPs and ILECs that if the firm wishes to have its directory assistance listings returned to them, BellSouth will honor such a request. In conclusion, BellSouth stated that from actions taken by BellSouth after the FCC's Louisiana II decision, MCImetro will receive the listings it requested through the complaint and that the Commission should find that no further action is necessary by the Commission at this time.

On March 29, 1999, MCImetro filed reply comments. MCImetro stated in its reply comments that based on BellSouth's comments, it appears that the parties are now substantially in agreement on this issue. MCImetro further stated that it requests the Commission

modify Finding of Fact No. 10 to reflect that BellSouth is not currently in compliance with its duties under the Agreement and the Act and that BellSouth has committed to remedy the problem by May 1, 1999. MCImetro further requested that the Commission modify Finding of Fact No. 10 to order BellSouth to provide access to its complete directory assistance database by May 1, 1999.

The Commission notes that BellSouth has agreed that after the Louisiana II decision, it will release all of its directory assistance listings, regardless of their source. BellSouth has agreed to provide all directory listings, and MCImetro's complaint on this issue is now moot. Therefore, the Commission finds it appropriate to revise Finding of Fact No. 10 to reflect that BellSouth has agreed to provide all of its directory assistance listings by no later than May 1, 1999 and to note that no further action is needed by the Commission at this time with respect to this issue.

WHEREUPON, the Commission reaches the following:

CONCLUSIONS

After careful consideration, the Commission finds it appropriate to revise Finding of Fact No. 10 of the Commission's February 10, 1999 Order in this docket to read as follows: "BellSouth has taken steps to release the requested directory assistance information sought by MCImetro by no later than May 1, 1999 as a result of the FCC's Louisiana II Order and should release that information by that date. Therefore, no further action is needed by the Commission at this time with respect to this issue."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 6th day of April, 1999.

APPENDIX B-3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. 3:99CV97MU

BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES, INC.
AND
THE NORTH CAROLINA UTILITIES COMMISSION,
Defendants.

[Filed May 20, 1999]

ORDER

MULLEN, Chief Judge:

This matter is before the court upon Defendant The North Carolina Utilities Commission's (the "NCUC") Motion to Dismiss the Complaint as against the NCUC on the grounds of Eleventh Amendment immunity, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for want of subject matter jurisdiction. This action was filed by BellSouth Telecommunications, Inc. ("BellSouth") seeking judicial review of the NCUC's February 10, 1999 Order Ruling on Complaint Proceedings Involving Interconnection Agreement. In its Petition, BellSouth also seeks a declaratory judgment concerning the controversy between the parties and a permanent injunction barring the NCUC from enforcing the February 10, 1999 Order.

In accordance with the terms of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "Act"), BellSouth and Defendant MCImetro Access Transmission Services, Inc. ("MCI") executed an Interconnection Agreement in April of 1997, which provided, in part, for the payment of reciprocal compensation for the termination of local traffic on each other's telephone networks. The Agreement was approved by the NCUC on May 12, 1997. A dispute subsequently arose between MCI and BellSouth concerning the interpretation of the nature of telephone calls made to an Internet Service Provider ("ISP") and how such calls are treated under the reciprocal compensation provisions of the Interconnection Agreement between BellSouth and MCI. BellSouth claims that the calls are interstate in nature, and thus, are not subject to the reciprocal compensation provisions of the Interconnection Agreement. MCI contends that the calls constitute local traffic that is subject to the reciprocal compensation provisions of the Agreement. On April 23, 1998, [MCI] filed a petition with the NCUC claiming that, *inter alia,* BellSouth had breached the Interconnection Agreement by withholding payment of reciprocal compensation and announcing its intention not to make further reciprocal compensation payments to MCI for traffic originated by BellSouth end-users and then carried by MCI to its ISP customers. On February 10, 1999, the NCUC ruled that the ISP traffic in question is local, and that MCI is entitled to reciprocal compensation in accordance with the terms of the Interconnection Agreement. The NCUC further ordered that BellSouth pay MCI all amounts past due, plus interest, as well as all sums coming due in the future for terminating the ISP traffic. It is this part of the Order that BellSouth seeks to overturn.

The court must first address the NCUC's argument that this court lacks subject matter jurisdiction to hear this case. This case was brought pursuant

to § 252(e)(6) of the 1996 Act, which provides in pertinent part:

> In a case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." The NCUC argues that the grant of federal jurisdiction pursuant to 47 U.S.C. § 252(e)(6) is coterminous with the exclusive federal jurisdiction set forth in § 252(e)(4), such that federal jurisdiction is limited to those commission orders "approving or rejecting" interconnection agreements, and does not extend to orders seeking to interpret or enforce such agreements. In other words, an order of a state commission such as the one at issue here is not a decision made "under" section 252.

The NCUC cites three district court cases in support of its argument, *GTE Florida, Inc. v. Johnson*, 964 F. Supp. 333 (N.D.Fla. 1997); *GTE South, Inc. v. Morrison*, 957 F. Supp. 800 (E.D.Va. 1997); and *GTE South, Inc. v. Breathett*, 963 F. Supp. 610 (E.D.Ky. 1997). In each of those cases, a party sought federal court review of an interconnection agreement dispute before the relevant state commission had approved a final interconnection agreement between the parties. For that reason, each court found that the Act did not support jurisdiction. Unlike the cited cases, the instant case involves a NCUC Order regarding an agreement that has already received an approval determination. Accordingly, these cases involve a different legal question and are inapposite to this case. *See Michigan Bell v.*

MFS Intelenet, 16 F. Supp.2d 817, 823 (W.D.Mich. 1998).

All federal court challenges to FCC rules implementing the Telecommunications Act of 1996 were consolidated in the Eighth Circuit case of *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1998), *aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999). In that case, a three-judge panel specifically found that enforcement decisions of state commissions are subject to federal district court review pursuant to Section 252(e)(6), stating: "We believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." 120 F.3d at 804, n.24. Moreover, the court found that § 252(e)(6) is "the exclusive means to attain review of state commission determinations under the Act." *Id.* at 803. This finding was not reversed by the Supreme Court on appeal.

Indeed, every court that has addressed this issue has held that federal district courts have jurisdiction under § 252(e)(6) to review state utility commission decisions enforcing and interpreting interconnection agreements approved by the commission pursuant to the Act. In *Michigan Bell v. Intelenet*, the commissioners, like the NCUC herein, argued that because the order at issue involved the interpretation and enforcement of an interconnection agreement, rather than its approval or rejection, the federal court lacked jurisdiction to review the order. The court rejected this argument, stating:

> [C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order will directly contravene the intent of Congress. . . . Reviewing this subpart of the Act as a whole, the Court notes that Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements. In Sections

> 252(e)(4) and (6), Congress stated in no uncertain terms its intention to have the federal courts, and not the state courts, review [state commission] decisions approving or rejecting interconnection agreements born of this subpart. . . . Thus, the statutory structure demonstrates Congress' intent to enlist the assistance of the state commissions while creating a uniform body of federal law in this area.
>
> . . .
>
> . . . Thus, the language of subsection (e)(4) prohibiting state courts from reviewing approval and rejection decisions implicitly encompasses interpretation and enforcement decisions. Given the statutory structure and language of section 252, the Court finds that the [state commission] decisions interpreting or enforcing interconnection agreements born of this subpart are also within the exclusive jurisdiction of the federal courts.

Michigan Bell, 16 F. Supp.2d at 823-24 (citations omitted).

Following the uniform holdings of every court that has considered the issue, this court likewise finds that it has jurisdiction pursuant to § 252 to review the NCUC Order herein. Accordingly, the court need not address whether 28 U.S.C. §§ 1331 and 1332 also support federal jurisdiction.

Having determined that the court has subject matter jurisdiction to entertain this matter, the court turns to the merits of the case. Shortly after Plaintiff's Petition was filed, the Federal Communications Commission ("FCC") issued a Declaratory Ruling concerning the jurisdictional status of calls to ISPs and whether a local exchange carrier is entitled to reciprocal compensation for traffic it delivers to ISPs. *See* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In Re Implementation of the Local Competition Provisions in the*

Telecommunications Act of 1996, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1999). In its Ruling, the FCC determined that ISP-bound traffic is largely interstate, in that it does not terminate at the ISP server, but constitutes a continuous transmission from the end-user to the Internet site. *Id.* at ¶12-13.

While the FCC *Declaratory Ruling* did determine that calls to ISPs are largely interstate, the FCC emphasized that this decision did not "interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. . . ." *Id.* at ¶ 21. The FCC noted that parties may have agreed to treat ISP-bound traffic as subject to reciprocal compensation and that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by state commissions." *Id.* at ¶ 22-23. The FCC listed several factors that state commissions may, but are not required, to consider when construing the parties' agreements to determine whether the parties agreed to treat ISP-bound traffic as local. *Id.* at ¶ 24.

Because the NCUC issued its Order in this case prior to the FCC's *Declaratory Ruling*, the court will remand this matter to the NCUC for reconsideration in light of that Ruling. The court recognizes that the NCUC may well reach the same decision, but nevertheless, the court wishes to give the NCUC an opportunity to re-examine its conclusions with the benefit of the recent FCC Ruling. As the court has found that it has subject matter jurisdiction and has determined that it will remand this matter to the NCUC for further consideration, the court finds it unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC, and therefore declines to decide that issue at this time. Likewise, the court declines to make any determinations at this time with regard to the appropriate standard of review. Accordingly,

IT IS THEREFORE ORDERED that the NCUC's Motion to Dismiss on the grounds of lack of subject matter jurisdiction is hereby DENIED;

IT IS FURTHER ORDERED that the court hereby REMANDS this matter to the NCUC for reconsideration in light of the FCC's *Declaratory Ruling* issued on February 26, 1999;

IT IS FURTHER ORDERED that Plaintiff's claims for declaratory judgment and injunctive relief are hereby DISMISSED without prejudice; and

IT IS FURTHER ORDERED that the Plaintiff's Motion to Stay, filed March 12, 1999, is hereby DENIED as moot.

This 19th day of May, 1999.

/s/ Graham C. Mullen
Graham C. Mullen
Chief Judge
United States District Judge

APPENDIX C-1

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-55, Sub 1096
IN THE MATTER OF
ENFORCEMENT OF INTERCONNECTION AGREEMENT
BETWEEN INTERMEDIA COMMUNICATIONS, INC., AND
BELLSOUTH TELECOMMUNICATIONS, INC.

[Filed Nov. 4, 1998]

ORDER CONCERNING
RECIPROCAL COMPENSATION FOR ISP TRAFFIC

BY THE COMMISSION: On June 10, 1998, Intermedia Communications, Inc. (Intermedia), filed a Petition to Enforce Interconnection Agreement against BellSouth Telecommunications, Inc. (BellSouth).

Intermedia stated that it had an Interconnection Agreement with BellSouth approved by Order dated October 10, 1996, which included a provision that the Commission would have jurisdiction over disputes and which further provided for the payment of reciprocal compensation for the termination of local traffic on each other's network. (Sections IV.A. and IV.B.). The Agreement defines "local traffic" as "any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service exchange." (Section I.D.). Intermedia alleged that in August 1997, BellSouth had announced that it had decided that telephone traffic placed within the same local calling area from a BellSouth end user to an Internet Service Provider (ISP) does not constitute "local traffic" within the meaning of that term under its various Interconnection Agreements and that it would not pay reciprocal compensation for such traffic.

Intermedia cited the Commission's February 26, 1998, decision in Docket No. P-55, Sub 1027 involving US LEC of North Carolina, LLC (US LEC) and BellSouth that ISP traffic does constitute local traffic for the purposes of the Interconnection Agreement between US LEC and BellSouth. BellSouth was ordered to pay US LEC for all ISP traffic terminated by US LEC. Intermedia pointed out that the provisions of its Interconnection Agreement were similar to those in the US LEC/BellSouth Agreement, and, as such, the decision in Docket No. P-55, Sub 1027 constitutes binding precedent for BellSouth's obligation to pay reciprocal compensation for the termination of ISP traffic.

Intermedia contended that BellSouth owes it $3,600,000 for reciprocal compensation and that this amount is increasing by more than $300,000 per month. Intermedia requested the Commission to grant expedited consideration to its Petition, enter an Order declaring BellSouth in breach of its Interconnection Agreement with Intermedia for failure to pay reciprocal compensation, order BellSouth to immediately pay Intermedia reciprocal compensation for the termination of past ISP traffic, order BellSouth to pay Intermedia reciprocal compensation for termination of future ISP traffic, and grant Intermedia such further relief as is just and proper.

On July 14, 1998, BellSouth filed a Response to Intermedia's Petition. BellSouth reiterated its well-known position that jurisdiction over ISP traffic is clearly vested in the Federal Communications Commission (FCC) and is interstate in nature. BellSouth said that the Commission should hold this matter in abeyance until such time as the FCC renders a decision—which the FCC intends to do. Should the Commission decide to consider Intermedia's Petition, it should set the matter for evidentiary hearing. BellSouth will show that the parties never reached the required meeting of the minds on whether ISP traffic would be subject to reciprocal compensation, and thus

Intermedia's breach of contract claim must fail. BellSouth noted that the Commission's February 26, 1998, Order on this subject as between BellSouth and US LEC in Docket No. P-55, Sub 1027 is currently on appeal to the United States District Court for the Western District of North Carolina in Docket No. 3:98CV170MU. BellSouth has applied for a stay of this Order in that court. Thus, BellSouth insisted that the February 26, 1998, Order is not a final Order constraining the Commission from hearing the merits of this dispute between Intermedia and BellSouth.

On July 20, 1998, Intermedia filed a Reply to BellSouth's Response. As to the matter of FCC jurisdiction, Intermedia noted that BellSouth had made the same argument with respect to the US LEC complaint proceeding, but the Commission in Conclusion No. 3 of its February 26, 1998, Order had recognized that the FCC had not squarely addressed the ISP issue but might do so in the future. Thus, the Commission is free to proceed and should do so. Furthermore, BellSouth's argument concerning an evidentiary hearing is without merit. The parties' Interconnection Agreement is not ambiguous. Indeed, BellSouth stated in its Response that the language of the Interconnection Agreement "speaks for itself." Accordingly, there is nothing to consider at an evidentiary hearing because there is no issue of fact in dispute. The issue presented here is one of law, which can be summarily ruled upon. Intermedia requested the Commission to give expedited consideration to this matter and issue an Order requiring immediate payment for termination of ISP traffic.

On August 7, 1998, the Chair issued an Order Requesting Comments on Procedure. The Chair specifically requested that BellSouth provide specific and cogent arguments why an evidentiary hearing is required in this docket. Intermedia was allowed to respond to these arguments. The Chair stated that at this point she was unconvinced that such a hearing is necessary inasmuch as the dispute appears to involve

solely a question of law and Section II of the Agreement states in part: "The parties desire to enter into this Agreement . . . and to repeal any and all other prior agreements, both written and oral . . . concerning the terms of the contract." Nevertheless, the Chair deemed it advisable to receive the arguments of the parties before the Commission rendered a final decision.

BellSouth Response

On September 3, 1998, BellSouth filed its Response as requested. First, BellSouth notified the Commission of a recent filing by the FCC that stated that it will reserve the question of whether calls to ISPs are subject to FCC jurisdiction by October 30, 1998, in the context of its consideration of the GTE DSL interstate access tariff. The Intermedia complaint should be held in abeyance pending resolution by the FCC of the GTE DSL investigation.

Should the Commission nevertheless desire to proceed, it should convene an evidentiary hearing to resolve the conflicting interpretations that the parties have attached to the term "terminate," a term that is not defined in the Agreement. The parties obviously attached different meanings to the term. Intermedia contends that the call terminates at the ISP switch; BellSouth maintains that the call does not terminate until it reaches its ultimate destination.

Because the term "terminate" is susceptible of two different meanings, the Commission should receive evidence on matters outside the language of the Agreement to ascertain the parties true intentions. This would include Intermedia presenting evidence to support its allegation that a telephone call allowing a North Carolina customer to interact with a computer in a foreign country terminates at an ISP's location and BellSouth presenting evidence to the contrary. BellSouth would also be able to present evidence of the situation of the parties when the Agreement was

executed, the circumstances surrounding its execution, courses of dealings between the parties, and trade usages.

Intermedia Reply

Intermedia filed a Reply on September 17, 1998. Intermedia argued that its enforcement proceeding should not be delayed further. Intermedia suggested that BellSouth had not given a full picture of what the FCC had said in its filing in the proceeding in the U.S. District Court for the Western District of North Carolina. The FCC's filing was more equivocal than BellSouth portrayed. The FCC in its filing had acknowledged that its proceedings may not be relevant to the subject issue, and in any event any decision it makes may not be applied retroactively, nor does it want enforcement issues to be referred to it. Intermedia noted that nearly 23 state regulatory commissions and three federal courts have all ruled that reciprocal compensation should be paid.

Intermedia further argued that there is no need for an evidentiary hearing because the word "terminate" is not ambiguous. Absent such ambiguity, the court will look at the contract to find the parties' intent. The issue present here is a legal one. As to whether calls to ISPs are local calls, the Commission has already ruled on this legal issue, and it should proceed forthwith to issue a decision.

WHEREUPON, the Commission now makes the following

FINDINGS AND CONCLUSIONS

After careful consideration, the Commission finds and concludes the following:

1. That there is no basis or need for an evidentiary hearing in this docket.

2. That the reciprocal compensation provision contained in the Interconnection Agreement between BellSouth and Intermedia is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area.

3. That BellSouth shall bill and pay reciprocal compensation for all such calls.

4. That BellSouth should be directed to immediately forward to Intermedia all sums currently due together with required late payment charges pursuant to their Interconnection Agreement, together with all sums coming due in the future for such traffic pursuant to the terms of their Agreement.

Discussion

The threshold question is whether the Commission should hold an evidentiary hearing in this docket. Intermedia argues that the question at hand is a legal question and susceptible to a summary decision without need for an evidentiary hearing. BellSouth argues otherwise maintaining that the term "terminate" is ambiguous.

The Commission agrees with Intermedia that the term "terminate" is not ambiguous for the reasons Intermedia has generally stated. The Commission furthermore agrees that the intent of the parties is to be derived from the contract itself. If BellSouth had wished the term "terminate" to have some meaning other than its plain meaning with respect to ISP traffic calls, it should have negotiated an exception for such calls in the contract itself. The Commission would further note the existence of a merger clause stating that the terms of the contract are to govern.

On the matters in dispute, given the Commission's February 26, 1998, decision in Docket No. P-55, Sub 1027, concerning substantially identical language in an

Interconnection Agreement between BellSouth and US LEC, the Commission can reach no other conclusion but that such traffic is local and entitled to reciprocal compensation under the terms of the Interconnection Agreement. This conclusion should apply to any similarly-situated competing local provider (CLP), such as Intermedia. The Commission is not disposed to engage in lengthy evidentiary hearings for each and every docket of this nature where there is no genuine issue of material fact and the Commission has spoken quite plainly that, as a matter of law, such traffic is local—a decision which has been unanimously reached by every state regulatory commission and appellate court that has considered it.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth's request for hearing in this docket be denied.

2. That the reciprocal compensation provision contained in the Interconnection Agreement between BellSouth and Intermedia is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area and that BellSouth shall bill and pay reciprocal compensation for all such calls.

3. That BellSouth shall forward to Intermedia all sums currently due together with required late payment charges pursuant to their Interconnection Agreement, together with all sums coming due in the future pursuant to the terms of their Agreement.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of November, 1998.

NORTH CAROLINA UTILITIES COMMISSION

/s/ Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

Commissioner Judy Hunt did not participate in this decision.

APPENDIX C-2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. 3:99CV5MU
BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff,
v.

INTERMEDIA COMMUNICATIONS, INC.
AND
THE NORTH CAROLINA UTILITIES COMMISSION,
Defendants.

[Filed May 20, 1999]

ORDER

MULLEN, Chief Judge:

This matter is before the court upon Defendant The North Carolina Utilities Commission's (the "NCUC") Motion to Dismiss the Complaint as against the NCUC on the grounds of Eleventh Amendment immunity, and pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for want of subject matter jurisdiction. This action was filed by BellSouth Telecommunications, Inc. ("BellSouth") seeking judicial review of the NCUC's November 4, 1998 Order Concerning Reciprocal Compensation for ISP Traffic. In its Petition, BellSouth also seeks a declaratory judgment concerning the controversy between the parties and a permanent injunction barring the NCUC from enforcing the November 4, 1998 Order.

In accordance with the terms of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

(1996) (the "Act"), BellSouth and Defendant Intermedia Communications, Inc. ("Intermedia") executed an Interconnection Agreement in June of 1996, which provided, in part, for the payment of reciprocal compensation for the termination of local traffic on each other's telephone networks. The Agreement was approved by the NCUC on October 10, 1996. A dispute subsequently arose between Intermedia and BellSouth concerning the interpretation of the nature of telephone calls made to an Internet Service Provider ("ISP") and how such calls are treated under the reciprocal compensation provisions of the Interconnection Agreement between BellSouth and Intermedia. BellSouth claims that the calls are interstate in nature, and thus, are not subject to the reciprocal compensation provisions of the Interconnection Agreement. Intermedia contends that the calls constitute local traffic that is subject to the reciprocal compensation provisions of the Agreement. On June 10, 1998, Intermedia filed a petition with the NCUC claiming that BellSouth had breached the Interconnection Agreement by withholding payment of reciprocal compensation and announcing its intention not to make further reciprocal compensation payments to Intermedia for traffic originated by BellSouth end users and then carried by Intermedia to its ISP customers. On November 4, 1998, the NCUC ruled that the ISP traffic in question is local, and that Intermedia is entitled to reciprocal compensation in accordance with the terms of the Interconnection Agreement. The NCUC further ordered that BellSouth pay Intermedia all sums currently due as well as all sums coming due in the future for terminating the ISP traffic. It is this ruling that BellSouth seeks to overturn.

Pursuant to BellSouth's motion, this court entered an Order on March 5, 1999 staying the enforcement of the NCUC Order during the pendency of this lawsuit. In that Order, the court informed the parties that the court was aware of the recent FCC decision that internet traffic is interstate, not local. The court directed

the parties to file briefs with the court addressing the impact of the FCC decision on this case. The parties have now filed such briefs.

The court must first address the NCUC's argument that this court lacks subject matter jurisdiction to hear this case. This case was brought pursuant to § 252(e)(6) of the 1996 Act, which provides in pertinent part:

> In a case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6).

Section 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." The NCUC argues that the grant of federal jurisdiction pursuant to 47 U.S.C. § 252(e)(6) is coterminous with the exclusive federal jurisdiction set forth in § 252(e)(4), such that federal jurisdiction is limited to those commission orders "approving or rejecting" interconnection agreements, and does not extend to orders seeking to interpret or enforce such agreements. In other words, an order of a state commission such as the one at issue here is not a decision made "under" section 252.

The NCUC cites three district court cases in support of its argument, *GTE Florida, Inc. v. Johnson*, 964 F. Supp. 333 (N.D.Fla. 1997); *GTE South, Inc. v. Morrison*, 957 F. Supp. 800 (E.D.Va. 1997); and *GTE South, Inc. v. Breathett*, 963 F. Supp. 610 (E.D.Ky. 1997). In each of those cases, a party sought federal court review of an interconnection agreement dispute before the relevant state commission had approved a final interconnection agreement between the parties. For that

reason, each court found that the Act did not support jurisdiction. Unlike the cited cases, the instant case involves a NCUC Order regarding an agreement that has already received an approval determination. Accordingly, these cases involve a different legal question and are inapposite to this case. *See Michigan Bell v. MFS Intelenet*, 16 F. Supp.2d 817, 823 (W.D.Mich. 1998).

All federal court challenges to FCC rules implementing the Telecommunications Act of 1996 were consolidated in the Eighth Circuit case of *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1998), *aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999). In that case, a three-judge panel specifically found that enforcement decisions of state commissions are subject to federal district court review pursuant to Section 252(e)(6), stating: "We believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." 120 F.3d at 804, n.24. Moreover, the court found that § 252(e)(6) is "the exclusive means to attain review of state commission determinations under the Act." *Id.* at 803. This finding was not reversed by the Supreme Court on appeal.

Indeed, every court that has addressed this issue has held that federal district courts have jurisdiction under § 252(e)(6) to review state utility commission decisions enforcing and interpreting interconnection agreements approved by the commission pursuant to the Act. In *Michigan Bell v. Intelenet,* the commissioners, like the NCUC herein, argued that because the order at issue involved the interpretation and enforcement of an interconnection agreement, rather than its approval or rejection, the federal court lacked jurisdiction to review the order. The court rejected this argument, stating:

> [C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order will directly contravene the intent of Congress. . . . Reviewing this subpart of the Act as

> a whole, the Court notes that Congress has created a unique framework which, while inviting state commissions to arbitrate and approve interconnection agreements, retains exclusive jurisdiction within the federal courts to ensure that those agreements meet federal requirements. In Sections 252(e)(4) and (6), Congress stated in no uncertain terms its intention to have the federal courts, and not the state courts, review [state commission] decisions approving or rejecting interconnection agreements born of this subpart. . . . Thus, the statutory structure demonstrates Congress' intent to enlist the assistance of the state commissions while creating a uniform body of federal law in this area.
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> . . . Thus, the language of subsection (e)(4) prohibiting state courts from reviewing approval and rejection decisions implicitly encompasses interpretation and enforcement decisions. Given the statutory structure and language of section 252, the Court finds that the [state commission] decisions interpreting or enforcing interconnection agreements born of this subpart are also within the exclusive jurisdiction of the federal courts.

Michigan Bell, 16 F. Supp.2d at 823-24 (citations omitted).

Following the uniform holdings of every court that has considered the issue, this court likewise finds that it has jurisdiction pursuant to § 252 to review the NCUC Order herein. Accordingly, the court need not address whether 28 U.S.C. §§ 1331 and 1332 also support federal jurisdiction.

Having determined that the court has subject matter jurisdiction to entertain this matter, the court turns to the merits of the case. Shortly after Plaintiff's Petition was filed, the Federal Communications Commission ("FCC") issued a Declaratory Ruling concerning the

jurisdictional status of calls to ISPs and whether a local exchange carrier is entitled to reciprocal compensation for traffic it delivers to ISPs. *See* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (February 26, 1999). In its Ruling, the FCC determined that ISP-bound traffic is largely interstate, in that it does not terminate at the ISP server, but constitutes a continuous transmission from the end-user to the Internet site. *Id.* at ¶ 12-13. As noted above, the court requested that the parties brief the impact of the FCC Ruling on the issues in this case.

While the FCC *Declaratory Ruling* did determine that calls to ISPs are largely interstate, the FCC emphasized that this decision did not "interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. . . ." *Id.* at ¶ 21. The FCC noted that parties may have agreed to treat ISP-bound traffic as subject to reciprocal compensation and that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by state commissions." *Id.* at ¶ 22-23. The FCC listed several factors that state commissions may, but are not required, to consider when construing the parties' agreements to determine whether the parties agreed to treat ISP-bound traffic as local. *Id.* at ¶ 24.

Because the NCUC issued its Order in this case prior to the FCC's *Declaratory Ruling*, the court will remand this matter to the NCUC for reconsideration in light of that Ruling. The court recognizes that the NCUC may well reach the same decision, but nevertheless, the court wishes to give the NCUC an opportunity to reexamine its conclusions with the benefit of the recent FCC Ruling. As the court has found that it has subject matter jurisdiction and has determined that it will

remand this matter to the NCUC for further consideration, the court finds it unnecessary to decide whether the Eleventh Amendment would bar suit against the NCUC, and therefore declines to decide that issue at this time. Likewise, the court declines to make any determinations at this time with regard to the appropriate standard of review. Accordingly,

IT IS THEREFORE ORDERED that the NCUC's Motion to Dismiss on the grounds of lack of subject matter jurisdiction is hereby DENIED;

IT IS FURTHER ORDERED that the court hereby REMANDS this matter to the NCUC for reconsideration in light of the FCC's *Declaratory Ruling* issued on February 26, 1999;

IT IS FURTHER ORDERED that Plaintiff's claims for declaratory judgment and injunctive relief are hereby DISMISSED without prejudice; and

IT IS FURTHER ORDERED that the stay entered in this matter on March 5, 1999 is hereby lifted.

This 19th day of May, 1999.

/s/ Graham C. Mullen
Graham C. Mullen
Chief Judge
United States District Judge

APPENDIX D-1

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-55, Sub 1027
IN THE MATTER OF
INTERCONNECTION AGREEMENT BETWEEN
BELLSOUTH TELECOMMUNICATIONS, INC., AND
US LEC OF NORTH CAROLINA, LLC

[Filed Feb. 26, 1998]

BEFORE: Jo Anne Sanford, Chair, Presiding; Commissioners Ralph A. Hunt and William R. Pittman

ORDER CONCERNING
RECIPROCAL COMPENSATION FOR ISP TRAFFIC

BY THE COMMISSION: On October 24, 1997, US LEC of North Carolina, LLC (US LEC) filed a Petition with the Commission to enforce its Interconnection Agreement with BellSouth Telecommunications Inc. (BellSouth), which was approved by the Commission on January 29, 1997. US LEC contends that BellSouth has breached the contract by failing to pay reciprocal compensation for the transport and termination of local exchange traffic from BellSouth end users that is handed off by BellSouth to US LEC for termination to US LEC local exchange end users who are information service providers (ISPs).

The Commission held an oral argument on this dispute on December 17, 1997. The following companies intervened in the proceeding in support of US LEC—Time Warner Communications of North Carolina, L.P. (Time Warner), CaroNet, LLC (CaroNet), ICG Telecom Group, Inc. (ICG), KMC Telecom, Inc. (KMC), TCG of the Carolinas, Inc. (TCG), Teleport Communications

Group (Teleport), and Intermedia Communications, Inc. (Intermedia) (collectively, intervenors).

I. Relevant Provisions of Interconnection Agreement

Section I.C. of the Interconnection Agreement defines "Local Traffic" as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

The Reciprocal Compensation provision in Section IV.A. of the Interconnection Agreement states:

> The delivery of local traffic between the parties shall be reciprocal and compensation will be mutual according to the provisions of this Agreement. The parties agree that the exchange of traffic on BellSouth's EAS routes shall be considered as local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section. EAS routes are those exchanges within an exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff.

Section IV.B. of the Interconnection Agreement states:

> Each party will pay the other for terminating its local traffic on the other's network the local interconnection rates as set forth in Attachment B-1, by this reference incorporated herein. The charges for local interconnection are to [be] billed monthly and payable quarterly after appropriate adjustments pursuant to this Agreement are made. Late payment fees, not to exceed 1% per month after the due date may be assessed, if the interconnection

charges are not paid within thirty (30) days of the due date.

II. Arguments of US LEC and Intervenors

US LEC and the intervenors argue that the Commission rather than the Federal Communications Commission (FCC) has jurisdiction since this is, according to US LEC, simply a contract enforcement action. All states that have had this issue presented to them have asserted jurisdiction.

US LEC and the intervenors contend that the calls at issue here are local, regardless of where and how the ISP provides the information service. US LEC cites the definition of "termination" in the Communications Standard Dictionary and that of the FCC in 47 CFR § 51.701(d).[1] Information services provided by an ISP are, moreover, wholly separate from the local exchange telecommunications service provided by US LEC. The FCC affirmed that enhanced service providers can continue to obtain services as end users under intrastate tariffs. The FCC in the Universal Service Order (USO) has also determined that Internet access consists of severable components. In sum, ISPs are not common carriers but end users who obtain requested information over a wholly separate packet-switched network.

US LEC and the intervenors note that BellSouth's position would lead to a class of calls for which no compensation would be provided. BellSouth itself charges its own ISP customers local business line rates and customers accessing ISPs within the local calling area are charged local rates. BellSouth treats the revenues

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[1] The FCC, for purposes of implementing the reciprocal compensation provisions of the 1996 Act, defined "termination" as "the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

as local for the purposes of separations and ARMIS reporting.

The Commission should require enforcement of negotiated contracts as a matter of sound public policy. BellSouth's position is highly anticompetitive. Considerable monies are being withheld by BellSouth. All states that have addressed this issue have rejected BellSouth's line of argument.

III. Arguments of BellSouth

BellSouth maintains that calls made by end users to ISPs do not constitute local traffic but rather are exchange access traffic that is jurisdictionally interstate. BellSouth's reasoning is that, for instance, a single Internet call may sprawl across interstate, intrastate, and even international jurisdictions, and is unseverable. The termination point, according to BellSouth, is not the ISP switch but the database or information to which the ISP provides access. Thus, ISP traffic is jurisdictionally interstate and ineligible for reciprocal compensation.

BellSouth contends that the FCC has consistently rejected attempts to partition interstate calls into jurisdictionally intrastate segments. Moreover, the FCC has not held that ISP traffic is local for the purposes of reciprocal compensation. The ISP exemption from access charges is not dispositive. It is only treatment of ISPs as end users for the purposes of the access charge system.

BellSouth further contends that sound public policy requires that ISP traffic not be subject to reciprocal compensation because the traffic is not balanced. ISPs generate large volumes of inbound calls that are much longer in duration than typical calls.

IV. Other States

A number of other states have addressed the same issue either separately or in the context of arbitration

proceedings. All have ruled that such traffic is local. The states that have ruled include: Arizona, Colorado, Minnesota, Oregon, Washington, West Virginia, New York, Maryland, Connecticut, Virginia, Michigan, and Texas.

An arbitrator in Texas ruled that the traffic was interstate, but was recently reversed by the Texas Commission.

FINDINGS OF FACT

1. BellSouth Telecommunications, Inc., a corporation duly organized and existing under the laws of the State of Georgia, is a "public utility" within the meaning of the North Carolina Public Utilities Act. BellSouth is engaged in the provision of interstate and intrastate telecommunications service, including local exchange service, under the laws of the State of North Carolina and the United States, and as such is subject to the jurisdiction of this Commission.

2. US LEC, a limited liability company organized under the laws of North Carolina, is a "competing local provider" (CLP), as defined in G.S. 62-3(7a), of local exchange and exchange access services in the State of North Carolina pursuant to a certificate issued by this Commission, and as such is subject to the jurisdiction of this Commission.

3. US LEC and BellSouth negotiated the Interconnection Agreement filed with the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (the Act). The Commission approved the Interconnection Agreement by Order dated January 29, 1997, under authority granted by Section 252(e) of the Act.

4. Section 251 of the Act obligates all telecommunications carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." and "to establish reciprocal compensation arrangements for the transport and

termination of telecommunications." Pursuant to the Act and the terms of their Interconnection Agreement, US LEC and BellSouth have interconnected their networks to enable an end user subscribing to US LEC's local exchange service to place calls to end users subscribing to BellSouth's local exchange service, and vice versa. Pursuant to the Act and Sections IV.A. and IV.B. of the Interconnection Agreement, BellSouth and US LEC agreed to pay reciprocal compensation to each other for telephone exchange traffic that originates on one company's network and terminates on the other's network.

5. BellSouth provides local exchange services to end-user customers, including certain business customers operating as ISPs. US LEC likewise provides local exchange services through its facilities to end-user customers, including certain business customers operating as ISPs.

6. Section I.C. of the Interconnection Agreement defines "Local Traffic" as:

> any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Service Tariff.

7. Typically, a customer of an ISP connects to an ISP by means of a local phone call, using telephone exchange service. A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the telephone exchange service bearing the called telephone number.

8. BellSouth treats calls to ISPs interconnected to its network as local traffic and charges is own ISP customers local business line rates for local telephone exchange service, thereby enabling customers of BellSouth's ISP customers to connect to their ISP by making a local phone call. When a BellSouth telephone

exchange service customer places a call to an ISP within the caller's local calling area, BellSouth treats this as a local call pursuant to the terms of its local tariffs.

9. The Commission has jurisdiction to interpret and enforce the provisions of interconnection agreements between telecommunications carriers and authority to hear and determine controversies concerning the interpretation and performance of such interconnection agreements under state and federal law and the terms thereof.

10. Calls that terminate within a local calling area, regardless of the identity of the end user, are local calls under Section I.C. of the Interconnection Agreement and Commission Rule R17-1, and nothing in the Interconnection Agreement or applicable law or regulations creates a distinction pertaining to calls placed to telephone exchange service end users which happen to be ISPs.

11. BellSouth's refusal to pay reciprocal compensation for calls made by BellSouth customers to ISPs served by US LEC is inconsistent with the reciprocal compensation terms of the Interconnection Agreement and BellSouth's obligation to provide reciprocal compensation under Section 251 of the Act.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The decision-making in this case is not an easy one. Forceful arguments have been made on both sides. The central issue involves whether traffic to an ISP from a caller within a local calling area is local. US LEC and the intervenors contend that it is; BellSouth contends that it is not.

A threshold question is whether the Commission has jurisdiction to hear and determine this controversy or to grant the relief requested by US LEC. After careful

consideration, the Commission concludes that it has jurisdiction to rule and finds that the ISP traffic under dispute is local and that US LEC is entitled to reciprocal compensation in accordance with the contract terms.

There are several reasons for this decision:

1. The Interconnection Agreement speaks of reciprocal compensation for local traffic. There is no exception for local traffic to an end user who happens to be an ISP. For the purposes of reciprocal compensation, the Commission concludes that the call terminates when it is delivered to the called local exchange telephone number of the end-user ISP. Even if it is conceded, for instance, that much Internet traffic travels onward into cyberspace, it cannot be argued that all such traffic is non-local. For example, a resident of Wake County might access the Commission's web page, an undoubtedly local transaction. Neither BellSouth nor anyone else knows with precision where these calls go. It would therefore be wrong *a priori* to identify all ISP calls as interstate.

2. BellSouth treats calls from its own end-user customers to ISPs it serves with telephone numbers in the same local calling area as local traffic. BellSouth charges its own ISP customers local business line rates for local telephone exchange service. When a BellSouth telephone exchange service customer places a call to an ISP within that caller's local calling area, BellSouth treats this as a local call pursuant to the terms of local tariffs. BellSouth also treats the revenues associated with the local exchange traffic to its ISP customers as local for purposes of separations and ARMIS reporting.

In addition, BellSouth's position would also appear to be inconsistent with this Commission's decision entered on December 23, 1997, in Docket No. P-55, Sub 1083, which BellSouth supported, concerning national directory assistance. In that docket, BellSouth conceded that the call bounced across state lines but should

nevertheless be considered not an interexchange service but an adjunct to local service.

3. The FCC has not squarely addressed this issue, although it may do so in the future. While both sides presented extensive exegeses on the obscurities of FCC rulings bearing on ISPs, there is nothing dispositive in the FCC rulings thus far.

4. Every state that has ruled on this matter to date has ruled that such ISP traffic is local.

IT IS, THEREFORE, ORDERED as follows:

1. That the reciprocal compensation provision contained in the Interconnection Agreement between BellSouth and US LEC is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area, and BellSouth shall bill and pay reciprocal compensation for all such calls.

2. That BellSouth is directed to immediately forward to US LEC all sums currently due together with the required late payment charges, pursuant to the terms of the Interconnection Agreement as interpreted herein, and is further directed to pay all sums coming due in the future for such traffic pursuant to the terms of the Interconnection Agreement as interpreted herein.

ISSUED BY ORDER OF THE COMMISSION.

This the 26th day of February, 1998.

NORTH CAROLINA UTILITIES COMMISSION

/s/ Gail L. Mount

Gail L. Mount, Deputy Clerk

APPENDIX D-2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

No. 3:98CV170MU
BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff,
v.
US LEC OF NORTH CAROLINA L.L.C.
AND
THE NORTH CAROLINA UTILITIES COMMISSION,
Defendants.

[Filed May 24, 1999]

ORDER

MULLEN, Chief Judge:

This matter is before the court upon the following motions: 1) Defendant US LEC of North Carolina L.L.C.'s ("US LEC") Motion to Dismiss, filed May 26, 1998 (docket # 8); 2) Plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") Motion to Stay, filed May 27, 1998 (docket # 10); 3) Defendant The North Carolina Utilities Commission's ("NCUC") Motion to Dismiss, filed June 4, 1998 (docket # 15); 4) a Motion to Intervene, filed June 4, 1998 (docket # 17); 5) US LEC's Motion for Leave to Supplement its Reply to BellSouth's Memorandum in Opposition to US LEC's Motion to Dismiss with Subsequent Authority, filed July 23, 1998 (docket # 36); 6) BellSouth's Motion for Primary Jurisdiction Referral, filed August 4, 1998 (docket # 37); 7) The NCUC's Motion to Amend its Response to BellSouth's Motion for Stay and Referral to FCC, filed September 3, 1998 (docket # 48);

8) WorldCom Technologies, Inc.'s Motion for Leave to Participate as *Amicus*, filed September 18, 1998 (docket # 50); 9) US LEC's Motion for Leave to Supplement its Memorandum of Law in Opposition to BellSouth's Motion to Stay with Subsequent Authority, filed September 25, 1998 (docket # 55); 10) The NCUC's Motion for Leave to Supplement its Brief in Support of its Motion to Dismiss with Subsequent Authority, filed December 3, 1998 (docket # 57); 11) Motion by the United States of America to Intervene, filed January 14, 1999 (docket # 58); BellSouth's Motion to Supplement its Memoranda of Law in Opposition to Motions to Dismiss of Defendants US LEC and The North Carolina Utilities Commission with Subsequent Authority, filed February 5, 1999 (docket # 62); 13) US LEC's Motion for Leave to Supplement its Filings with Subsequent Authority, filed February 26, 1999 (docket # 64); 14) BellSouth's Motion to File Supplemental Authority and Notice of Mootness of Motion for Primary Jurisdiction Referral, filed March 5, 1999 (docket # 65); 15) BellSouth's Motion to Release Security, filed March 12, 1999 (docket # 66); and 16) US LEC's Motion for Leave to Supplement its Reply to BellSouth's Memorandum in Opposition to US LEC's Motion to Dismiss with Subsequent Authority, filed March 12, 1999 (docket # 67).

It appears to the court that the issues in this case are identical to those in *BellSouth Telecommunications, Inc. v. Intermedia Communications, Inc. and The North Carolina Utilities Commission*, 3:99CV5-MU, and *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc. and The North Carolina Utilities Commission*, 3:99CV97-MU. In those cases, the court entered Orders on May 20, 1999 finding that it does in fact have subject matter jurisdiction over these disputes. The court remanded those cases to the NCUC for reconsideration in light of the recent FCC *Declaratory Ruling* released on February 26, 1999. For the reasons stated in those Orders, the court makes the same rulings in this case. Accordingly,

IT IS THEREFORE ORDERED THAT:

1) US LEC's Motion to Dismiss (docket # 8) is hereby DENIED;

2) The NCUC's Motion to Dismiss for lack of subject matter jurisdiction (docket # 15) is likewise hereby DENIED;

3) The Motion to Intervene (docket #17) is hereby DENIED at this time with leave to refile;

4) The Motion to Intervene by the United States of America (docket # 58) is hereby DENIED at this time because the court finds it unnecessary to address the Eleventh Amendment issue due to the court's decision to remand the case:

5) WorldCom Technologies, Inc.'s Motion for Leave to Participate as *Amicus* (docket # 50) is hereby DENIED as moot;

6) BellSouth's Motion for Primary Jurisdiction Referral (docket # 37) is hereby DENIED as moot;

7) BellSouth's Motion to Stay (docket # 10), The NCUC's Motion to Amend its Response to BellSouth's Motion for Stay and Referral to FCC (docket # 48), and US LEC's Motion for Leave to Supplement its Memorandum of Law in Opposition to BellSouth's Motion to Stay with Subsequent Authority (docket # 55) are all DENIED as moot;

8) BellSouth's Motion to Release Security (docket # 66) is hereby GRANTED, and the Clerk of Court is directed to return BellSouth's prior tender in the amount of $12,503,999.23, plus interest earned;

9) All motions for leave to supplement the record (docket #'s 36, 57, 62, 64, 65, and 67) are hereby GRANTED;

10) This matter is hereby REMANDED to the NCUC for reconsideration in light of the FCC's *Declaratory Ruling* issued on February 26, 1999; and

11) Plaintiff's claims for declaratory judgment and injunctive relief are hereby DISMISSED without prejudice.

This 24th day of May, 1999.

/s/ Graham C. Mullen
Graham C. Mullen
Chief Judge
United States District Judge

APPENDIX E

Constitutional Provision

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutory Provisions

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the

agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering Administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusve jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than

subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negoti ated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation

and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by

negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of state commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

Regulatory Provisions

47 C.F.R. § 51.701. Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) Telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination.* For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation.* For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

Supreme Court, U.S.
FILED
JUN 13 2001
CLERK

No. 00-1699

In the
Supreme Court of the United States

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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June 13, 2001 ****Counsel of Record***

QUESTIONS PRESENTED

I. WHETHER A STATE PUBLIC UTILITY COMMISSION'S ACTION RELATING TO THE ENFORCEMENT OF A PREVIOUSLY APPROVED SECTION 252 INTER-CONNECTION AGREEMENT IS A "DETERMINATION UNDER [SECTION 252]" AND THUS IS REVIEWABLE IN FEDERAL COURT UNDER 47 U.S.C. § 252.

II. WHETHER, IF 47 U.S.C. § 252(E)(6) DOES NOT SUPPLY JURISDICTION, A FEDERAL DISTRICT COURT HAS INDEPENDENT SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1331 TO DETERMINE WHETHER A STATE PUBLIC UTILITY COMMISSION'S ACTION INTERPRETING OR ENFORCING AN INTERCONNECTION AGREEMENT VIOLATES THE TELECOMMUNICATIONS ACT OF 1996.

III WHETHER A STATE COMMISSION'S PARTICIPATION IN IMPLEMENTING THE TELECOMMUNICATIONS ACT OF 1996, WHICH PROVIDES THAT STATE COMMISSION DETERMINATIONS UNDER IT ARE REVIEWABLE IN FEDERAL COURT, CONSTITUTES A WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

IV. WHETHER A SUIT TO ENJOIN STATE PUBLIC UTILITY COMMISSIONERS FROM ENFORCING A COMMISSION DECISION ENFORCING AN INTERCONNECTION AGREEMENT PREVIOUSLY APPROVED UNDER THE TELECOMMUNICATIONS ACT OF 1996 CAN BE MAINTAINED UNDER THE *EX PARTE YOUNG* DOCTRINE.

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No. 00-1699

In the
Supreme Court of the United States

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

NORTH CAROLINA UTILITIES COMMISSION'S RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent North Carolina Utilities Commission ("NCUC") does not oppose the petition for writ of *certiorari* seeking review of the opinion of the Circuit Court of Appeals for the Fourth Circuit reported at 240 F.3d 270 (2001) because some questions presented in this petition are essentially the same as those already before this Court in the case *Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224, 149 L. Ed. 2d

135 (2001), and the decisions of the Fourth and Seventh Circuits conflict.

However, Respondent opposes the Petitioner's request that this petition for *certiorari* be held pending resolution of *Mathias* and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, No. 00-1531 (petition for cert. filed Apr. 5, 2001) ("*Verizon Maryland*") (petition for cert. pending from *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279 (4th Cir. 2001) ("*Bell Atlantic*")). The Respondent NCUC would prefer that this Court grant *certiorari* as to those questions and consolidate this case for oral argument with the *Mathias* case.

In any event, the Respondent respectfully disagrees that the *Ex parte Young*[1] question is properly preserved for review in this case. Petitioner never sued the NCUC Commissioners despite notice of the omission in district court. Even in the Fourth Circuit Petitioner never moved to amend and the Fourth Circuit rightly ignored Petitioner's suggestion that the Court authorize an amendment if it believed there was an Eleventh Amendment problem.

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[1] *Ex parte Young*, 209 U.S. 123 (1908)

STATEMENT OF THE CASE

Introduction

The seed from which this case has grown is a matter of contract interpretation, put to the NCUC for consideration when disputes arose between several competing telecommunications providers and BellSouth Telecommunications, Inc. ("BellSouth"). The contracts involved are interconnection agreements that were reached through negotiation or arbitration as called for in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 66 (the "Act," the "1996 Act" or the "Telecommunications Act"), and no party claims to be aggrieved by the NCUC's approval of the agreements. Nor does any party contest that the NCUC had jurisdiction to interpret the terms of the agreements in the subsequent complaint proceedings. The NCUC interpreted the agreements to require payment where BellSouth argued none was due. Unhappy with that result, BellSouth sought review of the decisions. Rather than file appeal in State court, however, suit was filed against the competing providers and the NCUC in federal district court for judicial review as well as injunctive and declaratory relief. Thus arise the complex questions in this case: Whether a federal court has jurisdiction to review the decision of a State agency and whether such an action against a State commission is barred by sovereign immunity.

The Court of Appeals for the Fourth Circuit has found the suits against the NCUC are barred by sovereign immunity and should be dismissed. The Court found the NCUC decisions

should have been appealed in State court, not challenged by suits filed in federal court based on the Telecommunications Act or other general substantive federal jurisdiction. These determinations conflict with the decision reached by the Court of Appeals for the Seventh Circuit in *Mathias*. Under similar circumstances, the Seventh Circuit found State sovereign immunity was waived, and found such suits *must* be brought in federal court, pursuant to § 252 of the Telecommunications Act, for a determination whether federal law has been violated. After federal court review, the Seventh Circuit would then allow issues of contract interpretation to be addressed in State courts.

Proceedings Before the NCUC

This case addresses three suits filed by BellSouth in federal district court seeking relief from decisions of the NCUC with respect to complaints by three competing local exchange carriers ("LECs"): U.S. LEC of North Carolina, L.L.C. ("US LEC"), Intermedia Communications, Inc. ("Intermedia"), and MCImetro Access Transmission Services, Inc. ("MCImetro"). The competing LECs complained to the NCUC, in pertinent part, that Petitioner BellSouth was in breach of its interconnection agreements with them for failing to pay reciprocal compensation for calls from BellSouth customers to internet service providers ("ISPs") served by the competing carriers.[2] BellSouth disputed that compensation was due under

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[2] The agreements with US LEC and Intermedia were arrived at through negotiation pursuant to 47 U.S.C. § 252(a), and though some

the terms of the agreements. The NCUC ruled in favor of the competing carriers, finding that the reciprocal compensation provision applies to ISP calls when the originating caller and the called number are associated with the same local calling area. The NCUC directed BellSouth to pay reciprocal compensation for such calls, including amounts past due plus interest and amounts coming due in the future. *In re Interconnection Agreement Between BellSouth Telecomms., Inc., and U.S. LEC of North Carolina*, LLC, Docket No. P-55, Sub 1027 (NCUC Feb. 26, 1998), Pet. App. 106a, 114a; *In re Enforcement of Interconnection Agreement Between Intermedia Communications, Inc., and BellSouth Telecomms., Inc.*, Docket No. P-55, Sub 1096 (NCUC Nov. 4, 1998), Pet. App. 92a, 98a; *In re Complaint of MCImetro Access Transmission Servs., Inc. against Bell South Telecomms., Inc., for Breach of Approved Interconnection Agreement*, Docket No. P-55, Sub 1094 (NCUC Feb. 10, 1999), Pet. App. 17a, 70a-72a. The parties have agreed that substantial sums of money are involved.

District Court Decision

Relying on the Telecommunications Act of 1996 and 28 U.S.C. §§ 1331 and 1332 for subject matter jurisdiction, BellSouth sued the competing carriers and the NCUC in federal

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portions of the MCImetro agreement were arbitrated pursuant to 47 U.S.C. § 252(b), the reciprocal compensation term was arrived at through negotiation as well. The NCUC approved the interconnection agreements in earlier proceedings, and no review of the approval of the reciprocal compensation term was sought by any party.

court, in separate actions, seeking declaratory and injunctive relief from the Commission's decisions. *See* Order filed May 24, 1999 in *BellSouth Telecomms., Inc. v. US LEC of North Carolina L.L.C.*, No. 3:98CV170MU, Pet. App. 115a (the *US LEC* case); Order filed May 20, 1999 in *BellSouth Telecomms, Inc. v. Intermedia Communications, Inc.*, No. 3:99CV5MU, Pet. App. 99a (the *Intermedia* case); and Order filed May 20, 1999 in *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Serv., Inc.*, No. 3:99CV97MU, Pet. App. 85a (the *MCImetro* case). BellSouth argued that the Telecommunications Act provided authority to name the NCUC as a defendant in the cases. In each case, the NCUC moved to dismiss BellSouth's suit for lack of subject matter jurisdiction and Eleventh Amendment immunity. In the *US LEC* case, the first of the three, BellSouth responded in its Memorandum in Opposition to the North Carolina Utilities Commission filed June 23, 1998, that its action was not barred by the Eleventh Amendment because it was entitled to seek injunctive relief under the *Ex parte Young* doctrine. The NCUC, in its Reply to BellSouth's Memorandum Opposing NCUC's Motion to Dismiss the Complaint, filed July 8, 1998, argued *inter alia* that the *Ex parte Young* doctrine was inapplicable as only the NCUC itself had been sued. BellSouth did not move to add the Commissioners as parties, however, and later failed to make the Commissioners party to the other cases as well, although similar arguments were posed again.

While the suits were still pending in district court, the Federal Communications Commission ("FCC") released a Declaratory Ruling on February 26, 1999, concluding that calls

to internet service providers are largely interstate, rather than local, for purposes of determining reciprocal compensation. This Ruling is relied on by the Petitioner in support of its argument that federal policy does not support treating ISP traffic as local. However, the FCC Ruling specifically recognized the validity of State commission determinations treating ISP-bound traffic as local, pending issuance of a federal rule about how to handle such traffic, noting it had itself treated such calls as if they were local under a longstanding policy. *See In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3703 (¶ 23, 24) (Feb. 26, 1999), *vacated, Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).[3]

Soon after the FCC's Declaratory Ruling was issued, the district court ordered the parties in the *Intermedia* case to brief the court as to the impact of the Declaratory Ruling on the case. Upon receiving those briefs, the district court then issued orders in all three cases finding that it had jurisdiction to review the NCUC orders pursuant to § 252 of the Telecommunications Act. Then, "[turning] to the merits of the case," it remanded the

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[3] In its recent Order on remand, the FCC acknowledged again the authority of State commissions to determine that reciprocal compensation terms in interconnection agreements are applicable to ISP calls, pending issuance of a federal rule, and gave only prospective effect to the new interim pricing mechanism. Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, CC Docket Nos. 96-98, FCC 01-131, 2001 FCC LEXIS 2340, ¶ 15, ¶ 77, ¶ 78 (rel. Apr. 27, 2001).

cases to the NCUC for "reconsideration" in light of the FCC Ruling and dismissed the cases without prejudice. Pet. App. 85a, 89a (*MCImetro* case). The district court failed to address whether the Eleventh Amendment barred the suit, finding it unnecessary to do so "at this time." Pet. App. 89a-90a. *See* Pet. App. at 103a-105a (in the *Intermedia* case); Pet. App. at 89a-91a (in the *MCImetro* case); Pet. App. at 116a-117a (in the *US LEC* case).

The Fourth Circuit Decision

The NCUC and one competing carrier, US LEC, appealed. The cases were consolidated for review by the Fourth Circuit and were scheduled by the Court to be heard *seriatim* at oral argument with *Bell Atlantic*. The sovereign immunity issue was considered first. The Fourth Circuit considered the sovereign immunity issue first. The Court found that the district court erred when it asserted jurisdiction over a State and then exercised its jurisdiction by ordering further briefing and a remand while deferring the immunity issue until the case returned to the court. Pet. App. 10a ("Its refusal to address the Eleventh Amendment issue at the outset . . . interfered with North Carolina's sovereignty as protected by the Constitutional structure." (citation omitted)). The Court considered and rejected arguments from BellSouth and the United States, as intervenor, that the NCUC had waived its sovereign immunity by accepting a gift or gratuity when it engaged in the regulatory process for review of interconnection agreements pursuant to 47 U.S.C. § 252. Pet. App. 9a. The Court reasoned, "Congress's intent to condition participation in a federal program on waiver

of such immunity must be explicit and unmistakably clear." Pet. App. 9a; *See Bell Atlantic*, 240 F.3d at 289-90[4] (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

The Court found no such clear statement of intent in the Telecommunications Act. *See Bell Atlantic*, 240 F.3d at 293-94 ("[W]e have searched in vain for any statement of congressional intent to condition a State utility commission's participation in the 1999 Act's regulatory scheme on the waiver of its constitutionally predicated sovereign immunity."). In other contexts, by comparison, the Court observed that Congress has explicitly stated its intent to condition participation in a federal program on waiver of sovereign immunity, *e.g.*, the Rehabilitation Act, 42 U.S.C. § 2000d-7(a)(1), enacted under Congress's spending clause power. *Id.*, 240 F.3d at 292 ("That act states outright that a State 'shall not be immune under the Eleventh Amendment . . . from suit in Federal court' for a violation of the act's anti-discrimination edict." (citation omitted)).

Focusing in particular on the language in § 252(e)(6) that allows suit in federal court for review of certain State commission determinations, the Court found,

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[4] This case was decided contemporaneously with *Bell Atlantic*, a similar case on appeal from the District Court of Maryland, and reference is made to the Maryland decision for detailed discussion of the Court's legal analysis.

> A State official reading this provision would have no indication that the State commission, if it chose to make the reviewable determination, would be compelled to appear in federal court at the behest of an aggrieved telecommunications company. Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications - - a gift that is difficult to discern* - - the language of § 252 (e)(6) simply falls short when examined under our "stringent" tests for determining whether a State has waived its immunity from federal court jurisdiction.
>
> *Fn: The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." Cf. Virgil, Aeneid, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon *seeing* the large wooden horse left by the Greeks as a "gift" to the city of Troy)).

240 F.3d at 293 & n3.[5]

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[5] Aside from the skepticism implied in this quote, the Fourth Circuit apparently did not feel it needed to reach the question whether the State commissions were offered a "gift" or "gratuity," rather than a

Thus, the Fourth Circuit concluded the NCUC, like the Maryland Public Service Commission, was an agency of the State, entitled to dismissal on sovereign immunity grounds. Pet. App. 9a.

Next, the Fourth Circuit considered whether federal courts are granted jurisdiction in 47 U.S.C. § 252 (e)(6) to review State commission decisions enforcing previously approved interconnection agreements.[6] It concluded they are not. The Court found the language in § 252(e)(6) specifies a narrow basis for bringing federal suit, to consider decisions approving or rejecting interconnection agreements, and cannot be read to infer a broad basis for, or scope of, federal jurisdiction. It quoted from its companion decision in *Bell Atlantic*:

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sanction, or whether such a "gift" would be overly coercive. The NCUC contended that regulating interconnection agreements between competing local exchange carriers was an "otherwise lawful activity" in which it was already authorised to engage prior to enactment of the Telecommunications Act of 1996. As such, under *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 527 U.S. 666 (1999), Congress had no authority to condition the State's continued participation in that activity upon its waiver of its sovereign immunity.

[6] While the Court found the case should be dismissed as to the NCUC on sovereign immunity grounds, the jurisdiction issue was considered to determine whether the suits should be dismissed against carriers as well. Both the NCUC and US LEC appealed to the Fourth Circuit on jurisdiction grounds.

> While this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements. With respect to negotiated agreements in particular, the federal review is narrower. The *only* 'determination' that can be made by the State commission under § 252 on a negotiated agreement is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any "party aggrieved" to seek review in federal court.

Pet. App. 12a (citing *Bell Atlantic*, 240 F.3d at 302-03 (footnote omitted in original) (emphasis in original)). The Court found these enforcement decisions considered disputes that "involve contract administration and turn on the proper interpretation of these agreements and their proper enforcement," not the approval or rejection of the agreements themselves. Pet. App. 12a.

The Fourth Circuit determined that Congress intended to reserve "non-§ 252 determinations" made by State commissions, including those enforcing terms of interconnection agreements, for review in State courts pursuant to State law. Pet. App. 12a. It found from a review of the 1996

Act that Congress clearly intended to divide responsibility between federal and state regulators. *Bell Atlantic*, 240 F.3d at 300-01. Further, the Court found a clear intent to leave pre-1996 Act assignments of responsibility in place unless the 1996 Act expressly provided for federal responsibility. The Court found this point was explicitly made by Congress in § 601 (c)(1) of the 1996 Act, which states:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.
>
> Pub. L. No. 104-104, 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 note) (emphasis added).

Id., 240 F.3d at 301. The Court found that State commission authority to enforce interconnection agreements derives from the residual authority of State commissions and State courts, conferred by 47 U.S.C.§ 152 and by State law, and preserved by the 1996 Act. *Id.*, 240 F.3d at 306. Thus, the Court found that such "non-§ 252 determinations" are left for review by State courts, as provided by the existing law of the State that created the State commission. *Id*; *also see Turner v. Bank of North-America*, 4 U.S. 8, 11 (1799) (statutory jurisdiction of federal courts is strictly construed). It found the NCUC has jurisdiction over the administration of interconnection agreements entered into by public utility companies under its jurisdiction,

referencing as authority North Carolina General Statutes §§ 62-2, 62-30, 62-32, 62-60, 62-74, 62-110(f), and 62-133.5. Pet. App. 13a. It found the 1996 Act preserves judicial review of such decisions in State courts and referenced the relevant North Carolina provisions. Pet. App. 13a (citing N.C. GEN. STAT. §§ 62-90 and 62-96).

Finally, the Fourth Circuit found that the exercise of general federal-question jurisdiction under 28 U.S.C. § 1331 is not available in this context, as such a result would undermine the carefully considered intent of Congress in the 1996 Act to provide limited review of State commission decisions in federal court and leave other review to State commissions and State courts. Pet. App. 13a (citing *Bell Atlantic*, 240 F.3d at 307).

REASONS WHY THE PETITION FOR CERTIORARI IS NOT OPPOSED EXCEPT AS TO THE *EX PARTE YOUNG* QUESTION

The Petitioners argue that this case presents the same questions on which this Court granted *certiorari* in *Mathias*. The NCUC agrees that this case presents two questions that are essentially the same. Indeed, the decisions of the Seventh and the Fourth Circuits on these questions conflict. It is the Fourth Circuit which has properly applied this Court's Eleventh Amendment jurisprudence and which properly construed the Telecommunications Act.

One question presented in *Mathias* and in this case is whether, by participating in the review of interconnection

agreements pursuant to the Telecommunications Act of 1996, a State commission waives its sovereign immunity from suit in federal court. The Seventh Circuit found in *Mathias* that "the participation of the Commission in the scheme set out in the [1996] Act is a waiver of the state's sovereign immunity." 1999 U.S. App. LEXIS 20828 at *11 (7th Cir. June 18, 1999), *amended at*, 1999 U.S. App. LEXIS 20635 (Aug. 18, 1999) (referencing *MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("MCI")). It found that "Congress intended that the 'state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions.'" *Mathias*, 1999 U.S. App. LEXIS 20828 at *13 (quoting *MCI*, 168 F.3d at 320). In this case, the Fourth Circuit decided, to the contrary, that the Telecommunications Act of 1996 does not contain a clear statement of congressional intent to condition a State commission's participation in the Act's regulatory scheme on the waiver of its sovereign immunity; thus, there could be no knowing acceptance of a waiver condition.

Another question presented in *Mathias* and in this case is whether a federal court has jurisdiction, under 47 U.S.C. § 252, to review State commission decisions that interpret and enforce reciprocal compensation terms found in interconnection agreements that have already been approved by the State commission pursuant to 47 U.S.C. § 252. The Seventh Circuit found that such a decision must be reviewed in federal court for a determination whether it complies with the requirements of § 251 and § 252, and then State courts may consider whether the decision was interpreted contrary to the terms of the

interconnection agreement. *Mathias*, 1999 U.S. App. LEXIS 20828 at *13-*14 (referencing *MCI*, 168 F.3d at 320). The Fourth Circuit decided that federal court jurisdiction is *not* available pursuant to 47 U.S.C. § 252 to review decisions of the NCUC under essentially the same circumstances, and review of the decisions is left to State courts.

A related jurisdiction question presented in this case, but not addressed in *Mathias*, is whether federal jurisdiction can be founded on 28 U.S.C. § 1331. The issue was not addressed in *Mathias* because the Seventh Circuit found jurisdiction based on the specific provision in 47 U.S.C. § 252. The Fourth Circuit concluded general subject matter is not available, based on its conclusion that 47 U.S.C. § 252 provides only limited federal jurisdiction. Otherwise it found the limitations intended in § 252 would be undermined. Thus, the NCUC agrees that this Court may find it pertinent to consider whether federal jurisdiction is available under this alternative basis.

On the other hand, the NCUC *does not* agree with the Petitioners that the *Ex parte Young* question taken for review in *Mathias* is presented in this case. In *Mathias*, the Seventh Circuit disposed of the *Ex parte Young* issue by reference to its decision in *MCI* as amended at 183 F.3d 558 (7th Cir. 1999). There, the Seventh Circuit noted that it need not address the *Ex parte Young* issue because of its decision that State authorities had waived their Eleventh Amendment immunity. *See MCI*, 183 F.3d at 567 n.4. The Seventh Circuit has since stated on rehearing of the *MCI* decision that a "straightforward" *Ex parte Young* case is presented. *MCI Telecomms. Corp. v. Illinois Bell*

Tel. Co., 222 F.3d 323, 345 (7th Cir. 2000), *cert. denied sub nom. PSC v. Wisconsin Bell, Inc.*, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001) & *Illinois Commerce Comm'n v. MCI Telcomms. Corp.*, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001). In the *Mathias* case, the *Ex parte Young* argument was presented and the Illinois commissioners were named as parties.

In this case from the Fourth Circuit, the NCUC commissioners were *never* named as parties, despite the fact that the implications of this for *Ex parte Young* was repeatedly pointed out by the NCUC in the district court. Even on appeal the Petitioner never moved for leave to amend its complaint to add the Commissioners as parties. Petitioner simply suggested that: "If the Court were to determine that there is a substantial issue as to whether a Section 252(e)(6) suit against the NCUC itself violates the Eleventh Amendment it should allow BellSouth to amend its complaints . . ." Fourth Circuit Brief for BellSouth at 55. The Fourth Circuit rightly ignored this suggestion.[7]

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[7] It did decide in *BellAtlantic*, in which the Maryland Commissioners had been sued, that "the doctrine of *Ex parte Young* does not provide an exception for the action against the individual State officials because (1) the State officials' decision was based on State contract law and arguably did not involve an ongoing violation of federal law, and (2) the federal interests served in making State officials parties to this federal court action under 47 U.S.C. § 252 (e)(6) are marginal, if not nonexistent, and do not outweigh countervailing interests of federalism." 240 F.3d at 309. NCUC agrees with this result.

Now, the Petitioner asks this Court to hold all questions, including the *Ex parte Young* question, in abeyance pending resolution of the questions in *Mathias*. Then, if *Ex parte Young* is found to apply in *Mathias*, the Petitioner argues it should be entitled to raise the issue on remand before the Fourth Circuit. On remand, the Petitioner would argue again that it should be allowed to amend its complaint either in the court of appeals or in the district court by adding the NCUC Commissioners as parties and "take advantage of" the *Ex parte Young* doctrine.. Even if this Court were to decide in *Mathias* that State commissioners were properly sued under *Ex parte Young*, this Court should not give BellSouth the relief it requests.

The cases from this Court cited by Petitioner signify that leave to amend should be "freely given when justice so requires" in district court pursuant to Rule 15 (a), *see Forman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason - - such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - - the leave sought should, as the rules require, be 'freely given,'"), and *may* be granted "sparingly" by courts of appeals pursuant to Rule 21, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989) (Courts of Appeals have the authority to dismiss a dispensable nondiverse party pursuant to Rule but such authority should be exercised sparingly after careful consideration whether any party will be prejudiced). Petitioner also cites a Third Circuit case, *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997), which found Rule 21 permitted amendment on appeal to

add individual state officials and add a claim for prospective declaratory relief based on *Ex parte Young*. In that case, the motion to amend was allowed – although its filing was delayed – due to the "unexpected turn in the law as a result of *Seminole*." *Balgowan*, 115 F.3d at 217 (referencing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). The Court observed that *Seminole Tribe* was decided when the appeal was already pending in the Third Circuit, and overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), with implications relevant to the case.

The delay in this case is more like that described in *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997). That case also involved a belated attempt to add State officials to the suit based on *Ex parte Young*. The First Circuit stated,

> After the Supreme Court handed down its decision in *Seminole Tribe*, and certainly after the State of Maine filed its motion to dismiss for lack of subject matter jurisdiction based upon the ruling of *Seminole Tribe*, the probation officers had every reason "to suspect [] a jurisdictional difficulty" with their case, but took "no reasonable opportunity to cure it before the appeal." Under these circumstances, we believe it is only fair and reasonable to conclude that the appellants "had fair warning in the district court and failed to act on it; enough is enough."

118 F.3d at 54-55 (quoting *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1079 (7th Cir. 1986)).

So too, here the Petitioner had fair warning; "enough is enough."

Finally, the Petitioners ask that consideration of the petition for *certiorari* in this case be held in abeyance pending a decision in *Mathias,* and in *Verizon Maryland* if *certiorari* is granted in the latter case. The NCUC does not agree that this matter should be held in abeyance. The Court would benefit from the opportunity to consider substantive arguments of parties in this case as well as *Mathias* and in *Verizon Maryland.*

CONCLUSION

The Respondent does not oppose the petition for writ of *certiorari* because some questions presented are essentially the same as those already before this Court in *Mathias*, and the decisions of the circuit courts conflict. However, the Respondent respectfully disagrees that the *Ex parte Young* question is properly raised in this case. Additionally, Respondent opposes the Petitioner's request that this petition for *certiorari* be held pending resolution of *Mathias* and *Verizon Maryland.*

Respectfully submitted,

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